Supreme Court, U.S.
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No. 02-66

In The Supreme Court of the United States

THE CITY OF FEDERAL HEIGHTS, COLORADO,

Petitioner,

v.

ESSENCE, INC., a Colorado Corporation d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ and LISA EASTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit invalidated a provision of the City of Federal Heights' Adult Entertainment Establishment ordinance which prohibited anyone under twenty-one (21) years of age from entering any such establishment offering live nude dancing. The ordinance was applicable to both patrons and employees of adult entertainment establishments.

1. Does a municipality, in offering a rationale justifying its ordinance regulating adult entertainment establishments, have to demonstrate with empirical data a direct link or correlation between the ordinance and the amelioration of deleterious secondary effects in order for the ordinance to be valid?

2. Did the District Court abuse its discretion by refusing to consider the correlative factual support contained in the Affidavit of a former dancer when it was offered by the municipality concurrently with the discovery of the information?

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption. Sanclub Corporation, a Colorado corporation, commenced this litigation in the U.S. District Court for the District of Colorado on January 14, 1998. Respondent Essence, Inc. purchased 100% of the corporate assets of Sanclub Corporation, including the tradename "The Bare Essence", from Sanclub Corporation in July 1999. By order of the U.S. Court of Appeals for the Tenth Circuit dated September 19, 2000, Essence, Inc. was substituted for Sanclub Corporation as a party to this action.

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PETITION FOR A WRIT OF CERTIORARI

The City of Federal Heights, Colorado, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit invalidating the age restriction in Federal Heights' adult entertainment ordinance.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 285 F.3d 1272 (10th Cir. 2002). (Reproduced in Appendix A to this Petition, *infra*, pp. App. 1-App. 32). The Memorandum Opinion and Order of the United States District Court for the District of Colorado is unpublished, but is also reproduced in the Appendix to the Petition. (Appendix B, *infra*, pp. App. 33-App. 56).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered April 8, 2002. (Appendix A, *infra*, pp. App. 1-App. 32). No petition for rehearing was filed within the time period allowed by the Court of Appeals. This Petition for Writ of Certiorari was filed within ninety days of the Court of Appeal's judgment. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Amendments to the Constitution of the United States

The constitutional provision involved in this Petition is:

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The City of Federal Heights Code

The City of Federal Heights' ordinance provisions at issue in this Petition are:

ARTICLE XII – ADULT ENTERTAINMENT ESTABLISHMENTS

12-12-11 *Minimum Age Requirements*

A. It shall be unlawful for any person under eighteen (18) years of age to be upon the premises of any adult entertainment establishment.

B. Additionally, it shall be unlawful for any person under twenty-one (21) years of age to be upon the premises of any adult entertainment establishment which offers live nude dancing. For purposes of this Article, *nude* means as defined in Section 6-1-1(34) of the Code.

(Entire Article XII of the Federal Heights Code governing Adult Entertainment Establishments is reproduced at Appendix H, *infra*, pp. App. 86-App. 103).

Colorado Revised Statutes

The Colorado statutory provisions pertinent to this Petition are:

C.R.S. § 12-47-901. UNLAWFUL ACTS – EXCEPTIONS.

(1) Except as provided in section 18-13-122, C.R.S., it is unlawful for any person:

(a) To sell, serve, give away, dispose of, exchange, or deliver or permit the sale, serving, giving, or procuring of an alcohol beverage to or for any person under the age of twenty-one years. . . .

(Entire statute reproduced at Appendix F, *infra*, pp. App. 67-App. 79).

C.R.S. § 18-13-122. ILLEGAL POSSESSION OR CONSUMPTION OF ALCOHOL BY AN UNDERAGE PERSON.

(2)(a) Any person under twenty-one years of age who possesses or consumes ethyl alcohol anywhere in the state of Colorado commits illegal possession or consumption of alcohol by an underage person. Illegal possession or consumption of ethyl alcohol by an underage person is a strict liability offense.

(Entire statute reproduced at Appendix G, *infra*, pp. App. 80-App. 85).

Colorado Code of Regulations

The following Colorado regulatory provision is pertinent to this Petition:

DEPARTMENT OF REVENUE, LIQUOR ENFORCEMENT, REGULATION, § 47-900, CONDUCT OF ESTABLISHMENT.

C. Entertainment.

Live entertainment is permitted on any licensed premises, except that:

1. No person licensed under Articles 46, 47, and 48 of Title 12, nor any employee or agent of such person licensed under these Articles shall engage in or permit any person to perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

b. The touching, caressing or fondling of the breasts, buttocks, anus or genitals.

c. The displaying of pubic hair, anus, vulva or genitals.

2. No licensee nor any employee or agent of such licensee shall engage in or permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

3. No licensee nor any employee or agent of such licensee shall engage in or permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus. . . .

(Entire regulation reproduced at Appendix I, *infra*, pp. App. 104-App. 106).

STATEMENT OF THE CASE

This case presents issues of broad importance to municipalities seeking to regulate adult entertainment establishments within their borders. Numerous studies have shown that establishments that permit and display nude dancing have negative secondary effects on the surrounding communities. The City of Federal Heights, Colorado ("Federal Heights"), like most other municipalities, has enacted ordinances governing these establishments in order to minimize the negative secondary effects.

Nude dancing is expressive conduct protected by the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981). Municipalities, therefore, must exercise restraint when regulating adult entertainment establishments to ensure that guaranteed First Amendment freedoms are not arbitrarily or unnecessarily impacted. Federal Heights attempted to balance these competing factors when it enacted a minimum age requirement of twenty-one years for all patrons and employees of adult entertainment establishments offering nude dancing performances. The Tenth Circuit invalidated this provision of Federal Heights' ordinance, requiring it to support this provision with specific statistics, facts or studies demonstrating the impact of the ordinance on the negative secondary effects experienced by the community if those less than twenty-one years of age entered nude dancing establishments.

A. Federal Heights' Adult Entertainment Ordinance

The City of Federal Heights, Colorado is located north of the City and County of Denver. Federal Heights has had prior adverse experiences with adult entertainment establishments located in the City that resulted in negative secondary effects in the community, including a murder in the 1970's at an establishment featuring topless dancers. Order and Memorandum Opinion, Appendix B, *infra,* p. App. 36. [See also, Applt. App., p. 103.[1]] Following the guidelines and precedent set by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Federal Heights determined that its residents would benefit from ordinances regulating the operation of adult entertainment establishments within the City's limits. See, Federal Heights, Colo. Code § 12-12-1, *et seq., infra*, Appendix H, pp. App. 86-App. 103. The Code mandates that individuals, including employees, who enter establishments featuring live nude dancing must be at least twenty-one (21) years old. Federal Heights, Colo. Code § 12-12-11, Appendix H, *infra,* pp. App. 98-App. 99. The impetus for instituting regulations for adult entertainment businesses occurred in 1993 as the result of citizen complaints and criminal activity near these types of businesses. [Applt. App., pp. 99-100.] That fall, one resident, the mother of a seven-year-old child, complained to a member of the City Council that pornographic publications with explicit images on the covers were visible from magazine racks located in

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[1] References to the record before the United States Court of Appeals for the Tenth Circuit are to the Defendant-Appellant's and Cross-Appellee's Appendix to the Opening Brief, abbreviated and referred to herein as "Applt. App., p. *x*."

a local convenience store, and were easily accessible to curious young children. [Applt. App., p. 100.] Federal Heights' City Council determined that it was necessary to regulate establishments that sell pornographic material or feature other forms of adult entertainment in order to minimize and mitigate the negative impacts such establishments could have on the residents and surrounding community.

The City Council carefully considered the secondary effects of establishments that feature adult entertainment or sell adult materials by investigating and reviewing studies and reports detailing the relationship between these types of businesses, the increase in crime levels, and the decrease in property values in Federal Heights and other cities in which adult entertainment establishments are located. Federal Heights relied upon these reports and studies, as well as its own experience, in concluding that enacting regulations which govern these establishments could diminish the negative effects of such establishments on the surrounding community. [Applt. App., pp. 29-31 and 104-106.] Federal Heights' City Council articulated the reasons for regulating adult entertainment establishments in the ordinance: "It is the intent of this ordinance to impose reasonable time, place and manner restrictions upon adult entertainment establishments to serve the substantial government interest of protecting and preserving the quality and vitality of the City and its citizens and not to prohibit adult entertainment nor constitutionally protected speech." Federal Heights, Colo. Code § 12-12-1, Appendix H, *infra*, p. App. 86.

At issue in this Petition is the provision of the Code which mandates that all individuals, whether patrons or employees, who enter establishments at which live nude

dancing is offered be at least twenty-one years of age. Federal Heights, Colo. Code § 12-12-11, Appendix H, *infra*, pp. App. 98-App. 99. Colorado does not permit establishments offering all nude dancing to obtain a liquor license. C.C.R., Dept. of Revenue, Liquor Enforcement, § 47-900, Appendix I, *infra,* p. App. 105. Moreover, the State of Colorado has declared that it is unlawful for anyone under the age of twenty-one years to consume any type of alcohol, and unlawful for anyone in the State of Colorado to serve or provide an underage person alcoholic beverages without the express consent and presence of the young person's parent. C.R.S. §§ 12-47-901 and 18-13-122, Appendices F and G, respectively, *infra,* pp. App. 67 and App. 81. Federal Heights concluded that the known secondary effects of such establishments include increased crime and unlawful use of drugs and alcohol, and the City Council determined that persons under twenty-one should not be exposed to such an environment. Even though no alcohol can legally be sold, it is not beyond expectation to encounter the presence of alcohol and drugs in businesses featuring live nude dancing. By imposing the twenty-one year-old age limit on all individuals entering an adult entertainment establishment offering live nude dancing, Federal Heights hoped to minimize and mitigate young people's exposure to such harmful secondary effects.

B. Application of the Ordinance to Respondents and the Resulting Litigation

In November 1997, Federal Heights issued a license to Sanclub Corporation ("Sanclub") to operate an adult entertainment establishment. [Applt. App., pp. 11-12.] Sanclub opened The Bare Essence, located at 8485 Umatilla Street in Federal Heights, for the purpose of featuring

live all-nude dancing. [Applt. App., pp. 9-10.] The Bare Essence is not licensed to serve alcohol to patrons as Colorado's liquor licensing regulations bar establishments promoting totally nude dancers from obtaining a liquor license. C.C.R. § 47-900, Appendix I, *infra,* p. App. 105.

The Bare Essence is an "adult entertainment establishment" within the meaning of Federal Heights' ordinance. Under Article XII of Federal Heights' Code, "adult entertainment establishment" includes an "adult cabaret" which is defined as:

> A nightclub, bar, restaurant or similar business which regularly features:
>
> 1. Persons who appear in a state of nudity;
>
> 2. Live performances which are characterized by the exposure of specified anatomical areas or by specified sexual activities; or
>
> 3. Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

Federal Heights, Colo. Code §§ 12-12-2(A) and (D), Appendix H, *infra,* pp. App. 87-App. 88. The Bare Essence and its employees are therefore subject to the regulatory and licensing scheme adopted by Federal Heights, including the ordinance prohibiting those under the age of twenty-one from entering the establishment. Two women, Devona Richelle Lopez and Lisa Easton, who sought to perform as nude dancers at The Bare Essence, were denied employment

because of the age restriction. [Applt. App., p. 10.] They claimed to have sustained damages because they were not hired as dancers at The Bare Essence. [Applt. App., p. 16.]

Sanclub, which was then the owner of The Bare Essence, and the two women allegedly denied employment at The Bare Essence because they were younger than the twenty-one age minimum, challenged the constitutionality of the ordinance in the U.S. District Court for the District of Colorado, alleging that several provisions of the ordinance violated the First and Fourteenth Amendments to the United States Constitution.[2] [Applt. App., pp. 13-15.] Among their claims, they contended that Federal Heights had not sufficiently justified the need to restrict entry into adult cabarets showing nude dancing to those twenty-one years of age or older. [Applt. App., pp. 15 and 17.]

After litigation had been commenced, Sanclub sold its assets and the nude dancing establishment, including the tradename The Bare Essence, to Essence, Inc. ("Essence").[3] Essence continued to pursue the claims against Federal Heights that had been instituted by Sanclub.

While the case was pending in the District Court, Federal Heights did not enforce the age restriction ordinance. [Applt. App., p. 388.] Individuals younger than twenty-one years of age, but older than eighteen years of age, had access to adult entertainment establishments like

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[2] The specific claims asserted in the Complaint are discussed at greater length in Section C, Proceedings Below, *infra*.

[3] Essence was substituted for Sanclub as a party to this action while the appeal of this case was pending before the United States Court of Appeals for the Tenth Circuit.

The Bare Essence for several years, despite the ordinance's existence. After the parties had briefed the issues on cross-motions for summary judgment, but before the United States District Court for the District of Colorado had ruled on the motions, Federal Heights became aware that alcohol and drugs were available at The Bare Essence to dancers under age twenty-one. In mid-March 1999, a former dancer at The Bare Essence, Jennifer Weaver, approached the City and disclosed that dancers under the age of twenty-one were regularly exposed to and offered alcohol and marijuana while at The Bare Essence. Affidavit of Jennifer Weaver, Affidavit E, *infra*, pp. App. 63-App. 64. Until Ms. Weaver's voluntary disclosure of information, Federal Heights did not have confirmation of its suspicion of illicit activities occurring at The Bare Essence. [Applt. App., pp. 380-381 and 383-385.] Indeed, until Ms. Weaver's disclosure, no current or former employee of The Bare Essence had ever volunteered the type of information offered by Ms. Weaver, as doing so would likely have negative consequences to their employment or reputation among their peers. Although Federal Heights offered Ms. Weaver's Affidavit at the time the District Court heard oral argument on the cross-motions for summary judgment, the Court ruled that the information was not obtained in a timely enough fashion to be considered in support of Federal Heights' Motion for Summary Judgment, even though Ms. Weaver had signed her Affidavit only one day before Federal Heights moved to have the Affidavit admitted. Minute Order of March 19, 1999, Appendix C, *infra,* p. App. 57, and Transcript of Hearing of March 19, 1999, Appendix D, *infra,* pp. App. 61-App. 62.

C. Proceedings Below

Sanclub, Ms. Lopez, and Ms. Easton commenced this action in the United States District Court for the District of Colorado on January 14, 1998. [Applt. App., pp. 8-18.] Their complaint challenged the constitutionality of virtually all provisions of Federal Heights' adult entertainment ordinance. [Applt. App., pp. 13-16.] In particular, they claimed that several provisions of the ordinance violated the First Amendment's protections of free speech and expression. They sought a declaration that the ordinance was invalid, an injunction against Federal Heights preventing the enforcement of the ordinance, and monetary damages.

In addition to challenging the constitutionality of the age restriction, Sanclub sought to invalidate several other provisions in the ordinance, including: (1) the fee imposed by the ordinance on applicants seeking adult entertainment licenses, [Applt. App., pp. 11 and 15]; (2) the requirement that applicants disclose the identity of shareholders owning 10 percent or more interest in the enterprise [Applt. App., p. 13]; (3) the requirement that employees of adult entertainment establishments be licensed by Federal Heights [Applt. App., pp. 12-14]; (4) the lighting requirements imposed by the ordinance [Applt. App., pp. 11 and 15]; and (5) the design requirements, including the size, dimension, and fixture of the stage [Applt. App., pp. 11 and 15).

After reviewing the parties' cross-motions for summary judgment and supplemental briefs, and hearing oral argument, the District Court upheld the constitutionality of all but three of Federal Heights' adult entertainment ordinance provisions. Memorandum Opinion and Order,

Appendix B, *infra,* pp. App. 33-App. 56. In particular, the District Court upheld the ordinance provision that patrons must be at least 21 years of age; however, the District Court invalidated Federal Heights' twenty-one year old age restriction as it applied to dancers eighteen years of age or older. Memorandum Opinion and Order, Appendix B, *infra,* pp. App. 36-App. 39.[4] The District Court enjoined Federal Heights from enforcing the portions of the ordinance deemed invalid, and ordered that its decision be made final pursuant to Fed. R. Civ. P. 54(b) on those issues, finding that the claims for damages constituted a separate and severable claim for relief. Memorandum Opinion and Order, Appendix B, *infra,* pp. App. 54-App. 55.

On June 26, 2000, Sanclub, Ms. Lopez, and Ms. Easton filed a Motion for Reconsideration pursuant to Fed. R. Civ. P. 59(e), asking the District Court to reconsider its order upholding most of Federal Heights' adult entertainment ordinance. [Applt. App., pp. 437-439.] This Motion was denied in all substantive respects by the District Court on June 30, 2000. [Applt. App., p. 441.]

Federal Heights appealed to the United States Court of Appeals for the Tenth Circuit, arguing that the District Court had misapplied the test first adopted in *United States v. O'Brien*, 391 U.S. 367 (1968), and that the District

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[4] The District Court also invalidated portions of the ordinance permitting Federal Heights to deny a license if "serious criminal conduct" may occur, and that portion of the ordinance requiring applicants to disclose the percentage owned by holders of 10% or more shares in the business. These holdings of the District Court are not at issue in this Petition.

Court had abused its discretion in refusing to consider the factual support offered in the Affidavit of Jennifer Weaver. Sanclub, Ms. Lopez, and Ms. Easton cross-appealed, contending that the portions of the ordinance allowed to stand constituted unconstitutional prior restraints on speech and expression protected by the First Amendment.

A three-judge panel of the Tenth Circuit affirmed in part and reversed in part the District Court's Memorandum Opinion and Order, and remanded the matter back to the District Court for additional proceedings. Order of the Tenth Circuit, Appendix A, *infra,* pp. App. 1-App. 32. The Tenth Circuit held that Essence, Inc. (which had been substituted for Sanclub), Ms. Lopez, and Ms. Easton did not have standing to challenge the licensing portions of Federal Heights' adult entertainment ordinance, and ordered the case remanded to the District Court for the dismissal of those portions of the Complaint challenging the licensing provisions. Order of the Tenth Circuit, Appendix A, *infra*, pp. App. 9-App. 14.

However, the Tenth Circuit panel affirmed the District Court's invalidation of the age restriction as applicable to dancers who perform at establishments featuring live nude dancing, and reversed the District Court's decision to uphold the age restriction ordinance as to patrons. Although the Tenth Circuit acknowledged that "Federal Heights' evidentiary showing is substantial" and that Federal Heights had demonstrated its substantial interest "as a matter of law," the Tenth Circuit held that Federal Heights had to meet the additional burden of demonstrating that "its chosen weapon against these secondary effects will further its mission." Order of the Tenth Circuit, Appendix A, *infra,* pp. App. 19 and App. 22-App. 23. The

Court offered no authority in support of the rule it imposed.

Moreover, the Tenth Circuit stated that Federal Heights must also demonstrate that those under twenty-one years were actually being harmed by their presence in establishments featuring live nude performers. The Court noted that "Federal Heights must demonstrate that the harms it seeks to redress actually exist." Order of the Tenth Circuit, Appendix A, *infra,* p. App. 17, even though the Court also acknowledged that a "city 'may control a perceived risk' of secondary effects through regulation and need not wait until the secondary effects actually exist." Order of the Tenth Circuit, Appendix A, *infra*, p. App. 19, citing *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 688 (10th Cir. 1998). By invalidating the twenty-one year-old age restriction, the Tenth Circuit imposed upon Federal Heights and other municipalities under the Tenth Circuit's jurisdiction an onerous evidentiary burden for a municipality to enact regulations designed to reduce the negative secondary effects on a community created by the presence of adult entertainment establishments.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that adult entertainment and erotic materials, while protected speech, are not of the same "artistic value" as other speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). Nude dancing, of the type at issue here, "is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), citing *Barnes v. Glen Theatre, Inc.*,

501 U.S. 560 (1991) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Meriting less rigorous protection than other speech permits nude dancing and other forms of adult entertainment to be classified based upon their content. *Young*, 427 U.S. at 70.

Because of the adverse secondary effects associated with adult entertainment, municipalities have imposed regulations on these establishments. These regulations cannot, however, impose unconstitutional infringements on the expression of protected speech. As such, content-neutral regulations are reviewed under the analysis adopted by this Court in *O'Brien, supra*. Where protected expression contains "speech" and "non-speech" elements, the "non-speech" elements may be regulated if the government regulation:

> . . . is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. Subsequent rulings of this Court have further clarified the analysis appropriate to determine whether a municipality has articulated a substantial governmental interest to justify its need for the ordinance. A substantial governmental interest exists if the municipality's goal in regulating adult entertainment is to diminish the negative secondary effects associated with the presence of such erotic entertainment in a neighborhood. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1985).

This Court has concluded that regulations of adult entertainment businesses that are "content neutral" time, place and manner regulations are properly analyzed under the *O'Brien* test. *Young*, 427 U.S. at 70. In addition, when the *O'Brien* factors are applied to analyze whether an ordinance governing adult entertainment steps beyond the strictures of permissible governmental boundaries on speech, it is not necessary for a municipality to present new and specialized evidence demonstrating its substantial interest in combating the negative secondary effects of adult entertainment establishments. It is enough if the municipality relies upon studies carried out by other municipalities or evidence that "the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

Federal Heights' twenty-one year-old age restriction on individuals entering establishments featuring live nude dancing survives the *O'Brien/Renton* intermediate scrutiny analysis and should not have been invalidated by the Tenth Circuit because of a perceived evidentiary insufficiency.

I. THIS COURT SHOULD RESOLVE THE CONFLICT THAT EXISTS BETWEEN THIS COURT'S FIRST AMENDMENT "SUBSTANTIAL INTEREST" TEST AND THE TEST ADOPTED BY THE TENTH CIRCUIT.

In the nearly three decades since this Court first applied the four-prong *O'Brien* test to "content-neutral" time, place, and manner regulations of adult entertainment establishments, this Court has clarified the parameters of the substantial interest prong of the test on more than one occasion. Nevertheless, district courts and

circuit courts have diverged on the application of the test to facts presented in cases before them. Recently, this Court re-visited the second prong of the *O'Brien* and *Renton* secondary effects test "to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton, supra*." *City of Los Angeles v. Alameda Books, Inc.*, ___ U.S. ___, 122 S.Ct. 1728, 1733 (2002).

A. The Tenth Circuit's Opinion Directly Conflicts with the Test Articulated in *Los Angeles*.

The evidentiary burden the Tenth Circuit placed on local governments was expressly rejected by this Court in *Los Angeles, supra*. It is not necessary for a city to prove that its regulation is so narrowly tailored that it curtails the secondary effect it is targeting with laser precision. *Id.* at 1735: "If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest." *Id.* at 1736.

A municipality's rationale in adopting an ordinance affecting protected speech need only rely upon evidence the municipality "'*reasonably believed to be relevant*' for demonstrating a connection between speech and a substantial, independent government interest." *Id.*, citing *Renton*, 475 U.S. at 51-52 (emphasis added). The rule, as it has now been articulated, provides that:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If

> plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id., citing *Erie,* 529 U.S. at 298.

The secondary effects analysis crafted by the Tenth Circuit directly conflicts with the test articulated by this Court in *Los Angeles, supra*, following instead the logic that was advanced by respondent Alameda Books and rejected by this Court. In analyzing Federal Heights' requirement restricting admission to adult cabarets featuring live nude dancing to those twenty-one years of age or older, the Tenth Circuit applied the *O'Brien* factors to determine whether the ordinance curbs protected speech more than the First Amendment permits. The Tenth Circuit concluded that Federal Heights had not met its burden of demonstrating the ordinance's effect in furthering "an important or substantial government interest." Order of the Tenth Circuit, Appendix A, *infra,* p. App. 16. The Court reached this conclusion even though it devoted four pages of its order to the "substantial" evidentiary showing extending well beyond "mere incantations" of secondary effects provided by Federal Heights. Order of the Tenth Circuit, Appendix A, *infra,* pp. App. 19-App. 22. The uncontroverted evidence of the adverse secondary effects created by the presence of adult entertainment establishments was more than sufficient for the Tenth

Circuit to find "as a matter of law that [Federal Heights] has a substantial interest in combating the secondary effects associated with nude dancing." Order of the Tenth Circuit, Appendix A, *infra,* p. App. 23.

Despite these findings, the Tenth Circuit placed an additional burden upon Federal Heights, requiring it to show "that its chosen weapon against these secondary effects will further its mission," and "must establish that banning persons under twenty-one while maintaining nude dancing would combat the secondary effects associated with nude dancing." Order of the Tenth Circuit, Appendix A, *infra,* pp. App. 23-App. 24. In essence, the Tenth Circuit's scheme imposes upon Federal Heights and other municipalities the burden of verifying that the ordinance actually reduces the secondary effects it aims to mitigate. It requires Federal Heights to produce specific factual support for Federal Heights' reasonable belief that restricting access to live nude dancing to those over the age of twenty-one will reduce the negative secondary effects so well documented by Federal Heights. This Court deemed such a high burden "unwise." *Los Angeles,* 122 S.Ct. at 1737.

By imposing this heavy burden on Federal Heights, the Tenth Circuit has expanded the *O'Brien/Renton* secondary effects test beyond the boundaries drawn by this Court. The Tenth Circuit's requirement of specificity to justify Federal Heights' enactment of an age limitation is at odds with the test articulated by this Court in *Los Angeles, supra.*

B. No Prior Rulings of this Court Have Required the Heavy Evidentiary Burden Imposed by the Tenth Circuit.

In a series of cases, this Court has consistently held that it is sufficient for a municipality to "reasonably believe" that its regulations will diminish the secondary effects in order to establish a substantial interest in adopting the regulation. In *Renton, supra*, the City of Renton, Washington was permitted to rely upon studies conducted by the City of Seattle, Washington, to establish its substantial interest in enacting an ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential area. Certainly, Seattle's study could not have shown how the separation between adult entertainment establishments and residences in Renton affected any negative secondary effects experienced in Renton. Indeed, the *Renton* Court concluded Renton could rely upon Seattle's findings even though "Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton." *Renton,* 475 U.S. at 52.

In *Barnes, supra*, it was sufficient for the State of Indiana to show simply that mandating "pasties" and "G-strings" for dancers and prohibiting nude dancers served the "purpose of protecting societal order and morality." *Barnes*, 501 U.S. at 568. No additional justification was required by this Court. More recently, the City of Erie, Pennsylvania's ordinance prohibiting total nudity and requiring erotic dancers to wear "pasties" and "G-strings" was also upheld by this Court. Erie could rely upon the findings and studies used by Renton, Washington to support Erie's substantial interest in regulating adult entertainment. *Erie*, 529 U.S. at 296-297. Such reliance

was permissible even though the ordinance at issue in *Erie* was entirely different than that reviewed in *Renton*. *Erie*, therefore, did not require the municipality to demonstrate a direct link between the ordinance enacted and the negative secondary effects it sought to ameliorate.

> And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses .... Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, ... it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. *Id.* (citations omitted).

Most recently, in *Los Angeles, supra*, it was held acceptable for the City of Los Angeles to rely upon a 1977 report that generally studied the negative effects of adult entertainment to demonstrate the City's substantial interest in prohibiting two establishments from occupying the same building. Nothing in the 1977 study directly linked negative secondary effects on the community to the presence of two distinct adult businesses being located in the same building. Yet, this Court held the study to be more than sufficient support for the ordinance, and reversed the Ninth Circuit's ruling requiring Los Angeles to

produce evidence of a more direct link. *Los Angeles*, 122 S.Ct. at 1735-1736.

None of these rulings impose upon a municipality the burden of demonstrating a direct link between the "chosen weapon" and the "mission" of ameliorating the negative secondary effects of establishments offering erotic entertainment. The Tenth Circuit's imposition of this additional evidentiary burden to demonstrate a substantial interest directly conflicts with the rule crafted by this Court, and should therefore be overturned.

II. THE TEST FOR SECONDARY EFFECTS OF FIRST AMENDMENT EXPRESSION ADOPTED BY THE TENTH CIRCUIT CONFLICTS WITH THE TEST FOLLOWED BY OTHER CIRCUITS.

Following the reasoning of *Los Angeles, supra,* the Fifth Circuit reached a result opposite to the approach adopted by the Tenth Circuit in this case. In *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, ___ F.3d ___, 2002 WL 1339870 (5th Cir. June 20, 2002), the Fifth Circuit Court of Appeals upheld a Dallas ordinance that mandated bikini tops for all female erotic dancers. The plaintiffs maintained that the ordinance was overbroad and should be invalidated because the "relied-upon studies show no correlation between the bikini top requirement and the amelioration of the deleterious secondary effects." *Id.* at *1. The Fifth Circuit held that Dallas was not required to produce specific evidence linking bikini tops to reducing secondary effects. Rather, the general data showing negative effects on property values caused by the presence of sexually-oriented businesses was sufficient evidentiary support of Dallas's substantial interest in the regulation, even though no study was conducted demonstrating that a

change from "pasties" to bikini tops would impact the "deleterious" effects of such establishments. *Id.* at *9.

Similarly the Eighth Circuit rejected the reasoning of the district court which had invalidated the City of Rochester's regulatory ordinance because the City had not considered studies of "similar" establishments which offered both sexually explicit and non-explicit materials like the plaintiff, ILQ Investments. *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994). Other circuits have likewise adopted the reasoning of *Baby Dolls* and *Los Angeles*. See, for example, *Mitchell v. Commission on Adult Entertainment Est.*, 10 F.3d 123 (3d Cir. 1993) (upholding an ordinance limiting the hours of operation of adult bookstores even though no study demonstrated that limiting the hours of operation would specifically reduce negative effects); and *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (holding that the limitation of operating hours imposed by the City was sufficiently narrowly tailored and required no specific study that the hours mandated for closure would effect the negative effects created by the business's presence.).

The Tenth Circuit's reasoning conflicts with all of the circuits discussed above. Unlike the rationale followed by the Third, Eighth, Eleventh and, most recently, the Fifth Circuits, the Tenth Circuit declared it insufficient for Federal Heights to demonstrate its reasonable belief that the twenty-one age restriction would diminish the secondary effects through reliance on extensive studies of the negative impact of sexually oriented businesses on a community. Instead, the Tenth Circuit adhered to the rationale followed by the Ninth Circuit in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000),

which was rejected and reversed by this Court in *Los Angeles, supra.* Like the Ninth Circuit's overly burdensome interpretation of the *O'Brien/Renton* factors, the rule adopted by the Tenth Circuit imposes an "unnecessarily rigid burden of proof" on cities, and should be rejected. See *Renton*, 475 U.S. at 50.

III. THE TENTH CIRCUIT'S TEST IMPOSES AN IMPOSSIBLY HIGH STANDARD ON MUNICIPALITIES FOR ESTABLISHING SUBSTANTIAL GOVERNMENT INTEREST.

The substantial interest test adopted by the Tenth Circuit deprives municipalities of the freedom to experiment with solutions to the well-documented problems created by the presence of sexually oriented businesses. It is not the province of any court to question the wisdom of the mitigation method adopted by a municipality. *Young*, 427 U.S. at 71. One city may find that the negative effects of adult entertainment establishments can be most effectively reduced by concentrating such businesses in one small area; while others separate such businesses because they "reasonably believe" their substantial interests are best furthered through the remoteness of the businesses rather than their concentration. By allowing municipalities to "experiment with solutions to admittedly serious problems," as this Court has deemed appropriate, municipalities can be given the freedom to determine which of several alternative approaches will lead to the solution to the problem posed by adverse secondary effects. *Id.*

The Tenth Circuit would have Federal Heights present evidence of a direct correlation between banning those less than twenty-one years of age from the premises and a reduction in negative secondary effects. Order of the

Tenth Circuit, Appendix A, *infra,* p. App. 24. This Court has "never required" municipalities to present "empirical data" demonstrating "that its ordinance will successfully lower crime." *Los Angeles*, 122 S.Ct. at 1736. A requirement like that imposed by the Tenth Circuit "would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions.'" *Id.*, citing *Renton, supra,* and *Young, supra*. In essence, the Tenth Circuit's opinion deprives Federal Heights and other municipalities in this jurisdiction of their ability to avoid deleterious secondary effects before they are realized in the community. Where, as here, a municipality considers and experiments with an innovative solution to the negative secondary effects of adult entertainment establishments, the municipality "may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Id.*

Under the *O'Brien* and *Renton* analyses, Federal Heights' ordinance survives First Amendment intermediate scrutiny. As it does not ban adult entertainment altogether, Federal Heights' ordinance is properly analyzed as a time, place, and manner regulation. *Renton*, 475 U.S. at 46. Second, the ordinance is "content neutral" because it does not restrict the expression of speech in the form of nude dancing, but rather attempts to limit the negative secondary effects caused by exposing young and impressionable individuals to an atmosphere potentially teeming with tempting, illicit substances. Finally, Federal Heights possesses a substantial government interest in ensuring that its young people are not exposed to illicit substances or engage in underage drinking which is illegal under Colorado statutory law. The Colorado Supreme

Court twice has considered age restrictions applied to adult entertainment establishments under the First Amendment. On both occasions, the Colorado Supreme Court upheld regulations limiting entry to live nude dancing establishments to those over twenty-one years of age, finding the regulations constitutional and not violative of the First Amendment under *O'Brien* or *Renton*. *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272 (Colo. 1995); and *7250 Corp. v. Board of County Comm'rs for Adams County,* 799 P.2d 917 (Colo. 1990). Federal Heights' age restriction ordinance should therefore be upheld as a constitutional time, place, and manner restriction addressing the secondary effects that result from the free speech of live nude dancing.

IV. THE TENTH CIRCUIT FAILED TO CORRECT THE DISTRICT COURT'S ABUSE OF DISCRETION DEPRIVING FEDERAL HEIGHTS' OPPORTUNITY TO SHOW EVIDENCE OF CONCURRENT NEGATIVE EFFECTS.

Ironically, Federal Heights offered the very evidence that the Tenth Circuit declared was lacking in its presentation of substantial interest in regulating the age of those who frequent establishments offering live nude dancing. The Affidavit of Jennifer Weaver, Appendix E, *infra,* pp. App. 63-App. 65, offered as evidentiary support by Federal Heights but rejected as untimely by the District Court, established conclusively that at The Bare Essence, dancers under the age of twenty-one years were exposed to and offered alcohol and marijuana, *Id.* at pp. App. 63-64, in violation of State law. The Tenth Circuit affirmed this

ruling, finding no abuse of discretion by the District Court.[5] Federal Heights continues to suffer the injury of exposing its young people to illicit substances because it is deprived of the ability to enforce its age restriction ordinance by the Tenth Circuit's ruling. See *Erie*, 529 U.S. at 288.

In passing the age restriction ordinance, Federal Heights was acting upon its reasonable belief and concern that individuals deemed by the State of Colorado too young to handle responsibly the consumption of alcohol, would have access to alcoholic beverages or illicit drugs. The State of Colorado General Assembly enacted prohibitions against the service, sale, or procuring of alcoholic beverages "to or for any person under the age of twenty-one years." C.R.S. § 12-47-901(1)(a), Appendix F, *infra*, p. App. 67. The General Assembly viewed the matter as so critically important to the well-being of young people in the State, that it created the new strict liability criminal offense of "illegal possession or consumption of ethyl alcohol by an underage person." C.R.S. § 18-13-122(2)(a), Appendix G, *infra*, p. App. 81. Federal Heights was attempting to further this expressed State interest by prohibiting those under twenty-one years of age from entering an environment in which alcohol was likely to be found.[6]

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[5] Ms. Weaver's Affidavit was offered in support of Federal Heights' Motion for Summary Judgment the day after it was signed under oath. Federal Heights offered the Affidavit into evidence at the hearing on the parties' cross-motions for summary judgment.

[6] Colorado does not permit holders of liquor licenses to display, feature, or in any way permit full nudity at the establishment. C.C.R. §47-900, Appendix I, *infra*, pp. App. 104-106. Nonetheless, the restriction of

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The District Court's ruling improperly limited Federal Heights' ability to present evidence of *current* secondary effects to support its substantial government interest in regulating the age of patrons and employees of sexually oriented businesses featuring live nude dancing. In its opinion, the Tenth Circuit itself acknowledged that "the government body must point to evidence of secondary effects at the time of enactment *or evidence of current secondary effects*." Order of the Tenth Circuit, Appendix A, *infra*, p. App. 18, citing *Barnes*, 501 U.S. at 582 (emphasis added). "Thus, evidence of secondary effects occurring even years after the enactment of a statute may form the basis of a government's substantial interest in limiting those secondary effects." *Id.*, citing *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-411 (6th Cir. 1997). Although it acknowledged that municipalities may continue collecting and presenting evidence and empirical data of negative secondary effects caused by adult entertainment establishments, the Tenth Circuit's partial affirmation of the District Court's ruling denied Federal Heights the opportunity to exercise that latitude.

Federal Heights did not improperly withhold evidence of secondary effects in an attempt to undermine Essence's efforts to unearth contradictory evidence. On the contrary, Federal Heights offered into evidence the substance of Ms. Weaver's revelations promptly upon her signing her

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the sale of alcohol in such establishments does not mean that alcohol cannot or will not be present. Federal Heights concluded that despite the ban on the sale of alcoholic beverages at nude dancing establishments, alcohol was still likely to be present, and young people were still likely to be exposed to it. Jennifer Weaver confirmed that Federal Heights' concerns were justified.

Affidavit. There was no improper delay tactic or obstructionist discovery tactic at work. Federal Heights simply did not have in its possession the concrete evidence of deleterious secondary effects created by the presence of young people in the adult arcade until Ms. Weaver voluntarily stepped forward. Under *Barnes*, such current evidence appropriately supports Federal Heights' substantial interest in enacting the age restriction applicable to establishments featuring live nude dancing, and should have been admitted and considered by the District Court and the Tenth Circuit.

CONCLUSION

THEREFORE, Petitioner CITY OF FEDERAL HEIGHTS, COLORADO requests this Court GRANT its Petition for a Writ of Certiorari to the United State Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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July 5, 2002

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ESSENCE, INC., doing business as The Bare Essence, a Colorado corporation; DEVONA RICHELLE LOPEZ and LISA EASTON,

Plaintiffs-Appellees/ Cross-Appellants,

v.

THE CITY OF FEDERAL HEIGHTS,

Defendant-Appellant/ Cross-Appellee.

Nos. 00-1271 and 00-1286
(Filed Apr. 8, 2002)

Appeal from the United States District Court for the District of Colorado (D.C. No. 98-M-71)

Bradley J. Reich, (Arthur M. Schwartz, Michael W. Gross, on the briefs), Arthur M. Schwartz, P.C., Denver, Colorado, for Plaintiffs-Appellees/Cross-Appellants.

Steven J. Dawes, (Brian S. Popp, with him on the briefs), Griffiths, Tanoue & Light, Denver, Colorado, for Defendant-Appellant/Cross-Appellee.

Before **TACHA, ANDERSON,** and **MURPHY,** Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

During the middle to late 1990s, the defendant, City of Federal Heights, Colorado, enacted a series of ordinances governing the licensing and operation of adult entertainment businesses. Plaintiffs are Essence, Inc., a corporation that operates a nude dancing establishment, and Devona Richelle Lopez and Lisa Easton, two women denied employment as dancers by Essence, Inc. because they were younger than twenty-one at the time they sought employment. Plaintiffs present First Amendment facial challenges to multiple provisions of the Federal Heights municipal code. The district court, with a few exceptions, rejected the challenges and granted Federal Heights' summary judgment motion. This court has jurisdiction under 28 U.S.C. § 1291 and **affirms in part, reverses in part,** and **remands.**

II. BACKGROUND

At least as early as 1994, Federal Heights sought to regulate the location and operation of "adult entertainment establishments."[1] A series of ordinances followed

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[1] As used throughout this opinion, the phrase "adult entertainment establishment" shall have the meaning given it by Federal Heights Ordinance 96-12, sec. 1(A) (June 17, 1996), *codified at* Federal Heights Mun. Code ch. XII, art. XII, § 12-12-2(A): "An adult arcade, adult

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throughout the 1990s. The result was a comprehensive licensing and regulatory scheme governing adult entertainment establishments codified in Federal Heights Municipal Code chapter XII, article XII. It requires those seeking to do business as adult entertainment establishments to apply for a license from the City of Federal Heights. *See* Federal Heights Mun. Code ch. XII, art. XII, §§ 12-12-4 to -6. The code was amended in 1997 to require employees and managers of adult entertainment establishments to obtain licenses before they would be allowed to work. *See* Federal Heights Ordinance 97-15, § 6, *codified at* Federal Heights Mun. Code ch. XII, art. XII, § 12-12-10.[2]

Plaintiff Essence[3] applied for a business license in November 1996. It was informed by the Federal Heights City Administrator, Roger Tinklenberg, that it had met "all the preliminary requirements for issuance" of a license, but that a license would not issue until permits from the Building and Fire Departments were issued for

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bookstore, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment, all as defined herein, or other similar businesses . . . ." Relevant to this case is the definition of "adult cabaret": "A nightclub, bar, restaurant or similar business which regularly features . . . Persons who appear in a state of nudity . . . ." Federal Heights Mun. Code ch. XII, art. XII, § 12-12-2(A)(3).

[2] In this opinion, licenses issued under section 12-12-6 to businesses will be called "business licenses." Licenses issued under section 12-12-10 to employees or managers will be called "employee licenses."

[3] Essence, Inc. was called Sanclub Corporation throughout the proceedings before the district court. Some time prior to this appeal its name changed. At all times it did business in Federal Heights as "The Bare Essence." This opinion will refer to the plaintiff corporation as "Essence" and its establishment as "Bare Essence."

remodeling of Bare Essence. It is not clear whether Federal Heights ever issued the license. Following the death of the registered agent of Essence, Federal Heights required Essence to reapply for a license. Essence applied for another business license on October 28, 1997. Plaintiffs claim that before Federal Heights would issue the license it required substantial remodeling to ensure that dancers would be kept a minimum distance away from patrons and that there was adequate lighting inside and outside the premises. In addition, Federal Heights required Essence to comply with section 12-12-11(B) of the municipal code, which prohibited individuals under twenty-one from entering nude dancing establishments. As a result, because they were younger than twenty-one, plaintiffs Lopez and Easton were refused employment.[4] Essence was issued a business license on November 4, 1997.

In the meantime, the Federal Heights City Council introduced Ordinance 97-15. The Ordinance amended portions of chapter XII, article XII of the municipal code. Among other provisions, it amended section 12-12-10 to require employees and managers to obtain licenses from the city before they would be allowed to work. Ordinance 97-15 was adopted on December 2, 1997, nearly a month after Federal Heights issued a business license to Essence. That same day, the City Council passed Resolution 97-36, which set the application fees for an employee license.

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[4] Lopez and Easton have since turned twenty-one, and their claims for injunctive relief are moot. Lopez and Easton, however, also present damage claims which are dependent on their constitutional challenge to the Federal Heights ordinances. They thus retain a concrete interest in the outcome of this matter, rendering their challenge viable and not moot. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393-94 (1981).

On January 14, 1998, plaintiffs filed a lawsuit challenging the entirety of the Federal Heights adult entertainment regulatory scheme. The plaintiffs mounted a facial attack on numerous provisions of article XII, asking for declaratory and injunctive relief. Essence also claimed that enforcement of the provisions prior to the issuance of its business license caused Essence economic damages. Plaintiffs Lopez and Easton claimed monetary damages stemming from their inability to work as nude dancers at the Bare Essence.

Federal Heights moved for summary judgment, and plaintiffs filed a cross-motion for partial summary judgment. The issues contested were a subset of the claims asserted by plaintiffs. The plaintiffs challenged: (1) the age restriction contained in section 12-12-11(B)[5]; (2) the provision dealing with the denial of business licenses, section 12-12-6[6]; (3) section 12-12-9, which contained the

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[5] "[I]t shall be unlawful for any person under twenty-one (21) years of age to be upon the premises of any adult entertainment establishment which offers live nude dancing." Federal Heights Mun. Code ch. XII, art. XII, § 12-12-11(B).

[6] Section 12-12-3 makes it unlawful for a business to engage in business as an adult entertainment establishment without a license. Section 12-12-4 requires applicants for an adult entertainment license to file an application with the City Clerk; the section also specifies what information must be included in the application.

Section 12-12-6 sets out the procedure once the application is submitted. After the City Clerk receives the application, the Police Department, the Building Inspector, and the Fire chief investigate the applicant and its premises "for compliance with the applicable provisions of the municipal code." Those agencies turn the result of their investigations over to the City Administrator. Within 30 days of the Clerk's receipt of the application, the city Administrator must decide to grant a license or, if thee is probable cause to believe that there are grounds for denial, notify the applicant and refer the application to the

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procedures for suspending or revoking a business license[7]; (4) section 12-12-10, the employee licensing provision[8];

City Council. A hearing before the Council will be held within 20 days of the notice to the applicant. Review of the council's decision may be pursued according to Colorado law.

Section 12-12-6 also specifies grounds under which the City Council may deny an application. Among these grounds are a failure by the applicant to provide information reasonably necessary for the issuance of a license, the premise's noncompliance with applicable provisions of the municipal code, or when an applicant, partner, officer, director, or stockholder of more than 10% of the outstanding shares of the applicant business was either convicted of a crime listed in section 12-12-4(F)(1) or had an adult entertainment license denied, suspended, revoked, or non-renewed *and* as a consequence the issuance of a Federal Heights license would result in "serious criminal conduct."

[7] Section 12-12-9 provides the grounds for suspension and revocation of an adult entertainment business license. Under section 12-12-9(A), the City Council shall suspend a license, and may revoke it, if the licensee or its employees have violated any provision of article XII or have knowingly permitted an "unlawful act" upon the licensed premises. Section 12-12-9(B) provides that a license shall be revoked if the license has been suspended within a year, and the licensee or an employee knowingly allowed possession or sale of drugs, prostitution, the licensee operated the business while the license was suspended, or the licensee or employee allowed a sexual act on the premises. Section 12-12-9(E) requires that the City Council hold a public hearing on suspension or revocation within 20 days of notice to the licensee. The decision shall issue within 10 days of the hearing, and the decision may be appealed according to Colorado law.

[8] Section 12-12-10 (as amended by Ordinance 97-15) requires all managers and employees of a licensed establishment to apply for an employee's license. All applications will be investigated by the Police Department; the investigations shall be completed within fourteen days. After the investigation, the license shall issue unless the City Administrator finds grounds for denial of the license. There is no specific time limit on the City Administrator's decision. The grounds for denial include making false or misleading statements on the application, failing to provide the information required in section 12-12-10, failing to pay an annual license fee, being convicted of one of the criminal offenses listed in section 12-12-4(F)(1), or having an employee

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(5) the fees imposed on employee license applicants by Resolution 97-36; (6) requirements contained in section 12-12-4 that owners of an adult entertainment business disclose their ownership share in the business; and (7) sections 12-12-13, -14, and -15, which required certain stage configurations, lighting, and a minimum distance between dancers and patrons.

The district court granted defendant's motion in part and plaintiffs' motion in part. On the issue of the age restriction, the court held section 12-12-11(B) invalid as it applied to dancers, but valid as it applied to anyone else. The court recognized that the age restriction was a content neutral regulation and could thus be upheld if it was narrowly tailored to further a substantial governmental interest. It ruled, however, that Federal Heights had "made no showing that restricting the employment of performers to those over 21 has any relationship to the community's interest in avoidance or mitigation of the secondary effects from the operation of adult entertainment establishments." Dist. Ct. Op. at 6-7. As to patrons under the age of twenty-one, the court ruled that their First Amendment rights were "qualitative[ly] differen[t]" from the rights of the performers, that dancers' rights to express themselves through nude dancing "did not include a right to perform for a particular audience," and that the age restriction was "only an incidental burden on [Essence's] freedom." *Id.* at 7.

The district court ruled that sections 12-12-6, 12-12-9, and 12-12-10, the provisions dealing with the denial,

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license revoked by Federal Heights or other governmental entity within the five years preceding the date of application.

suspension, and revocation of business and employee licenses, contained all the requisite procedural safeguards. The court ruled that the fourteen day limit on the decision whether to grant an employee license under section 12-12-10 was not so long as to run afoul of the procedural safeguards of *Freedman v. Maryland,* 380 U.S. 51 (1965). *See* Dist. Ct. Op. at 8. The court did not address whether section 12-12-10 was invalid because it did not require the city to go to court to justify a denial of an employee license, nor did it consider whether 12-12-10 was invalid because it did not contain an adequate judicial review procedure. The court ruled that the judicial review following a denial of an application for a business license under section 12-12-6, or following a suspension or revocation of a business license under section 12-12-9, was adequate, even though the judicial review procedure did not guarantee a swift judicial decision. *Id.* at 8-10.

The district court also ruled that sections 12-12-6 and 12-12-9, for the most part, did not grant to the officials of Federal Heights impermissible discretion in deciding whether to grant, suspend, or revoke business licenses. The court accepted the city's narrowing construction of several phrases in the ordinance that otherwise seemed to give the City Administrator and City Council wide discretion to deny, suspend, or revoke a business license. *See id.* at 11. The district court, however, declared invalid the portion of section 12-12-6 allowing the City Council to deny an application for a business license if issuance of the license would result in "serious criminal conduct." *See id.* at 12.

The district court upheld portions of sections 12-12-6 and 12-12-10, which allowed denial of applications for business and employee licenses if a principal (in the case

of a business license) or employee has been convicted of certain crimes specified in section 12-12-4(F). The court analyzed the disqualification provisions as content neutral restrictions on speech and concluded that they furthered the substantial governmental interest in mitigating the secondary effects of adult businesses. *Id.* at 13-15.

The district court upheld the licensing fees imposed on applicants for employee licenses, observing that the fees were correlated to the costs of administering the licensing scheme. *Id.* at 16-17. Since plaintiffs did not prove the fees were excessive, the court declared them valid. *Id.* at 17. The district court also ruled on other provisions of the Municipal Code, including the requirements that principals of businesses seeking business licenses disclose their share of the business, that dancers maintain a certain distance from the stage, and that adequate lighting be installed both inside and outside the premises. The court declared invalid the portion of the Code requiring principals to disclose their exact share of an applicant [sic] for a business license, but upheld the premises configuration requirements. These rulings were not appealed.

III. STANDING

Before reaching the merits of the appeal, this court must satisfy itself that the parties have standing to invoke the power of the federal courts. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998). Neither the parties nor the district court addressed the question of plaintiffs' standing. Nevertheless, it is the responsibility of this court to raise the issue on its own to ensure that it has and the district court had before it an Article III case or controversy. *See Bender v. Williamsport Area Sch. Dist.,* 475 U.S.

534, 541 (1986). There are three requirements of Article III standing. First, the plaintiff must suffer an injury in fact. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). An injury in fact is an "invasion of a legally protected interest" that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical. *Id.* (quotations omitted). Second, the injury must be "fairly trace[able] to the challenged action of the defendant," rather than some third party not before the court. *Id.* (quotation omitted). Third, it must be likely that a favorable court decision will redress the injury of the plaintiff. *Id.* at 561. The burden to establish standing rests on the party invoking federal jurisdiction, and the evidence needed to carry that burden depends on the stage of litigation. *Id.; Loving v. Boren,* 133 F.3d 771, 772 (10th Cir. 1998). When the procedural posture of the case is a Federal Rule of Civil Procedure 56 motion for summary judgment and plaintiffs' standing is at issue, to prevail on such a motion "a plaintiff must establish that there exists no genuine issue of material fact as to justiciability," and "mere allegations" of injury, causation, and redressability are insufficient. *Dept. of Commerce v. United States House of Representatives,* 525 U.S. 316, 329 (1999).

We conclude that plaintiffs do not have Article III standing to challenge the portion of section 12-12-6 allowing the City of Federal Heights to deny a business license based on the previous criminal convictions of a principal or the portion of section 12-12-10 allowing the city to deny an employee license based on a previous criminal conviction of the applicant. Plaintiffs have neither demonstrated that no genuine issue of fact exists as to injury in fact, nor alleged facts necessary to show injury-in-fact. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990)

("[P]etitioners . . . must allege . . . facts essential to show jurisdiction. If [they] fai[l] to make the necessary allegations, [they have] no standing." (quotation omitted)).

Injury-in-fact must be concrete and imminent. Hypothetical or conjectural harm is not sufficient. When a law does not apply to a party, that party has suffered no invasion of a legally protected interest and may not question the law's constitutionality. *See Warth v. Seldin,* 422 U.S. 490, 504 (1975) (holding plaintiffs challenging zoning ordinance lacked standing because, among other reasons, "none is himself subject to the ordinance's strictures"). The portions of sections 12-12-6 and 12-12-10 that provide grounds for denial of licenses based on previous criminal convictions are remarkably similar to a provision challenged in *FW/PBS.* A "civil disability provision" prohibited the City of Dallas from issuing an adult entertainment license to an individual who had been convicted of one or more enumerated crimes. *FW/PBS,* 493 U.S. at 232. The Supreme Court held that no party before it had standing to challenge the disability provision because none could show that they had been convicted of a crime disabling them from receiving a license. *Id.* at 233-34, *see also East Brook Books, Inc. v. City of Memphis,* 48 F.3d 220, 227 (6th Cir. 1995) (same).

Similarly, 12-12-6 and 12-12-10's disability provisions do not apply to Essence or the individual plaintiffs. There is no allegation that Essence is owned or controlled by any individuals subject to the disability provision or that Essence has ever been owned by such individuals. Additionally, plaintiffs have not alleged that Essence employs such individuals or has had to deny employment to those convicted of crimes, nor is there an allegation that the individual plaintiffs have been convicted of crimes. Merely

because Essence is prospectively inhibited from such ownership and employment arrangements is, in this case, a hypothetical injury and not a concrete injury. As a consequence, the plaintiffs do not have standing, and the district court should have dismissed their challenge to the disability portions of section 12-12-6 and 12-12-10.

Essence has not alleged facts demonstrating injury-in-fact to support its challenge to the other portions of section 12-12-6. Section 12-12-6 allows the denial of an application for a business license on one of several grounds. Once an application is denied, the applicant may appeal the decision to the Colorado state courts pursuant to Colorado Rule of Civil Procedure 106(a)(4). Plaintiffs contend that the grounds for denial vest too much discretion in the licensing authority and that the judicial review procedure is inadequate. Essence, of course, has already been granted a license, and the allegedly overbroad discretion and lack of judicial review attendant to the application process do not apply to Essence. *See Clark v. City of Lakewood,* 259 F.3d 996, 1008 (9th Cir. 2001) (finding no injury in fact when cabaret owner who had license challenged licensing requirement); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 413 (6th Cir. 1997) (same). While section 12-12-5(C) requires a new application if there is any change in ownership of an adult entertainment establishment, Essence has not alleged that it will change ownership or is likely to do so. It is thus pure conjecture to say that Essence will again have to apply for a business license.

Essence has also failed to allege facts demonstrating that it has standing to challenge section 12-12-9. It asserts that section 12-12-9 gives too much discretion to the city to revoke or suspend a business license. Essence also asserts

section 12-12-9 fails to provide a stay of a suspension or revocation pending judicial review and fails to guarantee timely judicial review of the city's suspension and revocation decisions. Essence currently holds a business license. Thus, there is the *possibility* that the city will suspend or revoke the license through exercise of its allegedly overbroad discretion, unchecked by adequate procedural safeguards. An Article III injury, however, must be more than a possibility. *See Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) ("Allegations of *possible* future injury do not satisfy the requirements of Art. III." (emphasis added)). Essence must show that it "has sustained or is *immediately in danger of sustaining some direct injury.*" *City of Los Angeles v. Lyon,* 461 U.S. 95, 101-02 (1983) (emphasis added). The "threat of injury must be both real and immediate." *Id.* at 102 (quotation omitted). Of course, Essence need not "await the consummation of threatened injury," but the injury must be "certainly impending." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) (quotation omitted). Essence has not alleged that Federal Heights has sought to suspend or revoke its business license or has threatened to do so. Nor has it alleged any fact indicating that suspension or revocation may be imminent or that it has altered its behavior as a result of the provision. It has thus not carried its burden of demonstrating standing.[9]

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[9] There are cases that hold a possibility of license suspension or revocation confers standing. In *Deja Vu of Nashville, Inc. v. Metropolitan Government,* the Sixth Circuit held that the possibility that a licensor will suspend or revoke a license without adequate procedural safeguards constitutes a threat to the licenseholders' First Amendment interests and is itself a legally cognizable injury. *See* 274 F.3d 377, 399 (6th Cir. 2001). In *Deja Vu,* as in this case, the plaintiffs did not allege

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On remand, the district court should vacate the portion of its opinion and order upholding the disqualification provisions of sections 12-12-6 and 12-12-10, the portion of its opinion and order relating to plaintiffs' other challenges to section 12-12-6, and the portion of its opinion and order relating to plaintiffs' challenges to section 12-12-9. The district court should then dismiss the portions of plaintiffs' complaint challenging those provisions.

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that the licensor threatened to suspend or revoke their business license. *Id.* In holding that the plaintiffs had standing to challenge the municipal ordinance's alleged lack of adequate judicial review procedures, the Sixth Circuit relied on Supreme Court precedent establishing that a license *applicant* need not apply for and be denied a license before challenging a licensing requirement. *Id.* (quoting *Freedman v. Maryland,* 380 U.S. 51, 57 (1965)).

The analogy between an applicant and a licenseholder is not persuasive. The applicant has standing to bring a facial challenge to a licensing scheme vesting unbridled discretion in the licensor because of the likelihood of self-censorship: the applicant may be cowed into censoring its speech for fear of alienating the licensor and receiving an unfavorable decision on its application. *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 757 (1988). After the license has already been granted, however, circumstances change. First, self-censorship is spurred by apprehension of viewpoint hostility. *See id.* at 757-58. The approval of the license eliminates some concern that the licensor harbors covert hostility to the content of the licenseholder's speech. Second, self-censorship may be presumed in the application context because the licensor has the leverage of the pending application decision. After the license has been granted, however, the licensor lacks this ready means for influencing the licenseholder. We recognize that a threat of suspension or revocation would be one method of coercing the licenseholder to self-censor, and, as we have recognized, such a threat would provide standing. The precedent relied upon by the *Deja Vu* court also recognized standing when a licenseholder was actually threatened with revocation. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1074 (6th Cir. 1994); *see also Deja Vu,* 274 F.3d at 404 (Wellford, J., concurring in part and dissenting in part). Without some indication that Essence may lose its license to speak or is being pressured into not speaking, it cannot demonstrate injury.

IV. STANDARD OF REVIEW

This court reviews a summary judgement *de novo* and applies the same legal standard used by the district court under Rule 56. *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1124 (10th Cir. 2000). When determining whether there exist issues of material fact and whether the movant is entitled to judgment as a matter of law, a court looks at the record and the reasonable inferences from the record in the light most favorable to the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). Our review of the record is more rigorous in a First Amendment context. *Revo v. Disciplinary Bd. of the Supreme Court*, 106 F.3d 929, 932 (10th Cir. 1997). Accordingly, this court is "obligated to make an independent examination of the record in its entirety." *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 685 (10th Cir. 1998).

V. AGE RESTRICTION

Both parties contest the district court's handling of plaintiffs' challenge to section 12-12-11(B), the section prohibiting anyone under the age of twenty-one from being on the premises of a business offering live nude dancing. The district court ruled that section 12-12-11(B) was valid as applied to patrons of nude dancing establishments, but invalid as applied to dancers.

Nude dancing is expressive conduct protected by the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981). Such dancing is not "core" First Amendment speech, but rather "falls only within the outer ambit" of free speech protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion). As with any symbolic speech mixing elements of speech and conduct,

the first question to be answered is whether section 12-12-11(B) is content based or content neutral. *Texas v. Johnson,* 491 U.S. 397, 407 (1989). Content based regulations are subject to strict scrutiny, while content neutral regulations need only satisfy the more relaxed scrutiny specified in *United States v. O'Brien,* 391 U.S. 367, 377 (1968). *Id.* Because we conclude, however, that section 12-12-11(B) does not survive intermediate scrutiny under *O'Brien,* we need not decide whether it is content neutral or content based.

The *O'Brien* test has four factors. First, this court must assess whether Federal Heights possesses the constitutional power to enact the ordinance. Second, the regulation must further an important or substantial government interest. Third, the government interest must be unrelated to the suppression of free expression. Fourth, the restriction must be no greater than is essential to the furtherance of the government interest. *See O'Brien,* 391 U.S. at 377. It is the burden of Federal Heights to prove satisfaction of each of these elements. *See United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Z.J. Gifts,* 136 F.3d at 688. The city has not met its burden with respect to the second *O'Brien* requirement. We do not address the other factors.

A. The City's Interest in Limiting the Harmful Secondary Effects Associated with Nude Dancing.

The city asserts it has an interest in combating the harmful secondary effects flowing from nude dancing, including a decrease in property values, an increase in

crime, and sexually transmitted diseases.[10] The city's interest is undeniably important. *Pap's A.M.*, 529 U.S. at 296 (plurality opinion). The city must demonstrate, however, that the harms it seeks to circumscribe are real. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). The city has presented undisputed evidence establishing the existence of harmful secondary effects of nude dancing establishments and, accordingly, that it has a substantial or important interest in limiting those effects.

A municipality only has a substantial or important governmental interest in combating the harmful secondary effects of nude dancing if those secondary effects are real. *Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3d Cir. 1997) (en banc).[11] The Supreme Court held in *Renton*

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[10] Federal Heights seems to argue in portions of its brief that it passed the age restriction because it determined that individuals aged eighteen to twenty are at a greater risk than the general population from the secondary effects of nude dancing establishments. Federal Heights has not, however, demonstrated that its interest in protecting those younger than twenty-one is substantial. Federal Heights must demonstrate that the harms it seeks to redress actually exist. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Federal Heights offered evidence that general harmful secondary effects do indeed flow from adult entertainment establishments. *See infra*. The city did not, however, present any evidence that those younger than twenty-one are any more susceptible to those harmful effects. Indeed, there is no indication in the record that those aged eighteen to twenty are even affected by the harmful secondary effects of nude dancing. Without presenting such evidence, the city cannot establish that its interest in protecting those younger than twenty-one is substantial.

[11] There is some support for the position that since the Supreme Court has repeatedly accepted evidentiary showings that secondary effects do in fact result from the presence of adult entertainment establishments, a city may presume their reality. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 244 (1990) (opinion of White, J.) ("*Renton* and *Young* also make clear that there *is* a substantial

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that a city enacting an ordinance aimed at secondary effects can rely on evidence "reasonably believed to be relevant to the problem the city addresses." 475 U.S. at 51-52. The city need not "conduct new studies or produce" independent evidence of the secondary effects, but may rely on the experience of other cities. *Id.* at 51. In order to prove a substantial interest in limiting the secondary effects of sexually oriented businesses, the governmental body must point to evidence of secondary effects at the time of enactment or evidence of current secondary effects. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring in the judgment) ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current governmental interest* . . . ." (emphasis added)).[12] Thus, evidence of secondary effects occurring even years after the enactment of a statute may form the basis of a government's substantial interest in limiting those secondary effects. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997) (rejecting the argument that evidence of secondary effects developed after enactment of

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governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them . . . .") (emphasis added). *But see Pap's A.M.*, 529 U.S. at 313 (opinion of Souter, J.) (requiring "a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity"). Because this court holds that Federal Heights has actually demonstrated that the secondary effects of nude dancing are real, we need not consider whether it may presume their reality.

[12] Numerous courts have concluded that Justice Souter's opinion should be read as the holding of the *Barnes* court. *See Tunick v. Safir*, 209 F.3d 67, 83 (2d Cir. 2000) (separate opinion of Calabresi, J.) (noting that Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have read Justice Souter's opinion as the holding of *Barnes*).

adult entertainment regulation is irrelevant); *see also J & B Entm't, Inc. v. City of Jackson,* 152 F.3d 362, 371-72 (5th Cir. 1998).

Other courts have required a substantial evidentiary showing of secondary effects before a city's interest in combating them will be deemed substantial or important. The Fifth Circuit requires a showing based on "testimony of individuals, local studies, or the experiences of other cities." *SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1274 (5th Cir. 1988). Merely stating the words "secondary effects" in a preamble is insufficient. *J & B Entm't,* 152 F.3d at 373-74. The Third Circuit requires the regulating governmental body to identify the secondary effects "with some particularity" and put forth "some record support for the existence of those effects." *Phillips,* 107 F.3d at 175.

This circuit has declared that a city's stated purpose to limit the impact of secondary effects must be credited and "accorded high respect." *Z.J. Gifts,* 136 F.3d at 688 (quotation omitted). A city "may control a perceived risk" of secondary effects through regulation and need not wait until the secondary effects actually exist. *Id.*

Federal Heights' evidentiary showing is substantial. The preamble to Ordinance 94-16, which enacted the predecessor of section 12-12-11(B), recited several harmful secondary effects that the city found were caused by "adult entertainment establishments." There is no preamble to Ordinance 95-11, which enacted section 12-12-11(B), but section 12 of the ordinance provided that the ordinance "is deemed necessary for the protection of the health, welfare, and safety of the community." Ordinance 96-15 amended the zoning laws of Federal Heights to prohibit adult entertainment establishments from locating within 500

feet of a church, school, other adult entertainment establishment, or a residential zone. The preamble recites that the city consulted land use studies from other cities demonstrating adverse secondary impacts from adult businesses, but the cities, the authors, and details of the studies are not included.

Ordinance 97-15 amended other provisions of the adult business regulations and created, among other things, an employee licensing scheme. The preamble to 97-15 cites *Renton* for the proposition that it may rely on the experience of other cities with harmful secondary effects from adult businesses and need not "await the impact of such effects." The preamble also states that the City Council and administrators have reviewed many land use studies concerning secondary effects. The location and dates of fourteen studies are listed, but no details are given. From these studies, the City Council concluded that secondary effects result from adult businesses. These effects include increased rates of certain crimes, the spread of sexually transmitted diseases, and harmful effects on surrounding residences and businesses including decreased property values and parking and traffic problems.

The affidavit of Sharon Richardson, Mayor Pro Tem of Federal Heights, states that "residents shared concerns with me about the nature of the effects of Adult Entertainment Establishments on the community." Section 12-12-11(b) was supported by "studies and information received subsequent to the 1995 ordinance." The City Council's deliberations on Zoning Ordinance 96-15, she testifies, took into account "secondary impact studies both locally and nationally." Crime statistics relating to adult businesses were presented to the Council, as was an

informal survey of other Colorado communities regarding their experiences with the secondary effects of adult businesses. Ms. Richardson also testified that Federal Heights had a topless dancer club from 1975 to 1979 and that there were "numerous problems . . . including one murder on the premises."

In this case, Federal Heights has offered undisputed evidence that secondary effects have resulted and will result from nude dancing clubs and other forms of adult entertainment. As noted above, there are numerous statements in the preambles of various Federal Heights ordinances that the presence of adult entertainment establishments would result in harmful secondary effects. These preambles are not "mere incantations" of secondary effects. *See J & B Entm't,* 152 F.3d at 373-74. Rather, they are a detailed list of the harmful effects the City Council expected to flow from adult entertainment establishments. Detailed as they are, and, given the testimony of Mayor Pro Tem Richardson, supported by studies and information received by the Council, these preambles are strong evidence of secondary effects. *See id.* at 374 (preamble statements properly explained are evidence of substantial governmental interest in limiting secondary effects). Additionally, the City Council was in close communication with its constituents who made clear that there were concerns about the effect of adult establishments on the community. The subsequent pronouncements of the City Council that it felt the need to deal with the imminent secondary effects of adult establishments should be interpreted as experienced, "particularized, expert judgments" entitled to significant weight. *See Pap's A.M.,* 529 U.S. at 297-98 (plurality opinion). Moreover, Federal Heights consulted several studies from other jurisdictions and

relied on court decisions detailing the secondary effects flowing from such establishments. Ms. Richardson's affidavit also reveals that Federal Heights and the City Council had some experience with a topless dancing club and its attendant problems. *See DLS, Inc.*, 107 F.3d at 410 (noting that city's experience with crime-ridden adult cabaret fifteen years before enactment of adult entertainment ordinance was evidence that secondary effects result from adult cabarets).

When there is evidence of secondary effects in the form of supported preamble statements, studies and court decisions relied upon by the governing body, and localized experience with crime or other secondary effects associated with nude dancing, the city is entitled to summary judgment on the existence of a substantial governmental interest unless the challenger presents conflicting evidence giving rise to an issue of fact. *See Jones v. Denver Post Corp.*, 203 F.3d 748, 751 (10th Cir. 2000) (party opposing summary judgment motion must "identify sufficient evidence which would require submission of the case to the jury" (quotations omitted)). Plaintiffs have not referenced any evidence casting doubt on the existence of secondary effects. Accordingly, Federal Heights has demonstrated as a matter of law that it has a substantial interest in combating the secondary effects associated with nude dancing.

B. Requirement that the Age Restriction Furthers the City's Interest.

The *O'Brien* test is not satisfied, however, merely by the existence of a substantial governmental interest in regulating secondary effects. The city must also prove that

its chosen weapon against these secondary effects will further its mission. The city has chosen to combat the general secondary effects associated with nude dancing not by banning nude dancing outright, but by banning those under twenty-one from nude dancing establishments. The district court ruled that Federal Heights failed to present evidence that its age restriction on dancers would further its interest in combating secondary effects. Dist. Ct. Op. at 6-7. It therefore denied Federal Heights motion for summary judgment in part and granted plaintiffs' in part.[13]

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[13] The district court upheld the age restriction as it applied to patrons, because it believed there is a "qualitative difference" between the rights of dancers and observers. We do not decide whether those who receive protected expression have a lesser right than those who send such expression. We note that observers or recipients of expression do have some First Amendment rights. *See U.S. West, Inc. v. FCC,* 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech."); *see also Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas." (quotations omitted)).

Moreover, Essence may assert those rights. Although federal courts generally have prevented parties from asserting the rights of others, the traditional rule prohibiting the assertion of the rights of others is prudential rather than jurisdictional in the Article III sense. *See United Food & Commercial Workers Union v. Brown Group,* 517 U.S. 544, 557 (1996). Because this case presents a facial challenge on First Amendment grounds, the prudential standing rules are relaxed. *See Virginia v. American Booksellers Assoc., Inc.,* 484 U.S. 383, 392-93 (1988). A well-established exception to the bar against third-party standing is when the exercise of rights by the third party is intertwined with the litigant's activities. As the Supreme Court explained:

> [w]hen . . . enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to

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A ban on nude dancing would necessarily further the city's interest in minimizing secondary effects. *Pap's A.M.*, 529 U.S. at 300-01 (plurality opinion); *Barnes*, 501 U.S. at 584 (Souter, J., concurring in the judgment). Federal Heights' more limited ban on the presence of those under twenty-one complicates the analysis. Compliance with the ordinance does not require further clothing of the dancers. Federal Heights must thus establish that banning persons under twenty-one while maintaining nude dancing would combat the secondary effects associated with nude dancing.

The city attempted to demonstrate that the age restriction furthers its interest in combating secondary effects by offering the affidavit of Mayor Pro Tem Richardson and the affidavit of Jennifer Weaver, a former dancer

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which relationship the third party has legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist.

United States Dept. of Labor v. Triplett, 494 U.S. 715, 720 (1990); *see also Craig v. Boren*, 429 U.S. 190, 195 (1976) (allowing beer vendor to assert the rights of males under twenty-one in an equal protection challenge to an Oklahoma liquor law and observing that vendors have been "uniformly permitted" to challenge restrictions "by acting as advocates of the rights of third parties who seek access to their market or function"). The right of eighteen to twenty-year olds to watch nude dancing depends upon whether nude dancing establishments, such as the Bare Essence, are allowed to show nude dancing. In such a case, a restriction on a nude dancing establishment can result in an indirect violation of the rights of audience members.

Because patrons of nude dancing establishments do have some First Amendment interest in observing nude dancing, and because Essence may assert that interest, the district court erred in bifurcating its analysis. Instead, it should have evaluated the age restriction as a whole under *O'Brien*.

at Bare Essence. The city did not offer the Weaver affidavit until the day of oral argument on the cross-motions for summary judgment, almost six months after it filed its summary judgment motion. Weaver was a dancer at the Bare Essence and testified to observing numerous illegal activities and conduct at the club violating the Federal Heights ordinance. Specifically, Weaver testified to seeing dancers under the age of twenty-one drinking alcohol, being told in an employee meeting that it was acceptable for dancers to drink alcohol, and observing customers bring alcohol into the club for employees. Weaver's affidavit tends to prove that underage drinking occurs at nude dancing establishments and that the age restriction would be effective in reducing the crime of underage drinking.

The district court denied Federal Heights' motion to supplement its reply brief with the affidavit. Our review of that decision, like review of other evidentiary rulings, is for abuse of discretion. *See Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 894 (10th Cir. 1997) ("[W]e review a district court's decision to exclude evidence at the summary judgment stage for abuse of discretion."). Plaintiffs objected to the affidavit as untimely and irrelevant. The transcript indicates that the district court initially thought the affidavit probative only as to the standing of plaintiffs and, hence, irrelevant to consideration of the cross-motions. The court, however, subsequently recognized that the city offered the affidavit to establish the city's need for the age restriction. Thus, the only ground upon which the district court could have denied the motion was timeliness.

A district court may, in its discretion, consider an untimely affidavit for "cause shown" if the failure to timely file the affidavit "was the result of excusable neglect." Fed.

R. Civ. P. 6(b)(2).[14] Federal Heights contends that the district court abused its discretion by concluding there was no evidence that the age restriction would further the city's interest in preventing secondary effects "and yet the Court did not consider or allow the presentation of evidence which directly addressed the adverse secondary effects." The city's position is essentially that an abuse of discretion arises whenever a district court refuses to consider evidence necessary to one party's case. This court, however, will not overturn the district court's evidentiary decision unless we are firmly convinced that it made a clear error of judgment. *United States v. Magleby,* 241 F.3d 1306, 1315 (10th Cir. 2001). The district court's exclusion of the late affidavit was not such an error. *Cf. United States v. Diaz,* 189 F.3d 1239, 1247 (10th Cir. 1999) (holding district court has wide discretion to exclude expert testimony for which notice is untimely); *see also United States v. Adams,* 271 F.3d 1236, 1244 (10th Cir. 2001) (holding district court justifiably excluded psychologist testimony on timeliness grounds alone).

The only other materials offered by Federal Heights was Mayor Pro Tem Richardson's affidavit. Richardson testified that the City Council determined that "the minimum age requirement of Code § 12-12-11 would assist

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[14] Rule 6(d) requires that affidavits supporting a motion be served with the motion. Fed. R. Civ. P. 6(d). Rule 6(b)(2) allows a district court, in its discretion, to admit an untimely filing upon motion if the failure to timely act was the result of excusable neglect. Fed. R. Civ. P. 6(b)(2). Rule 6(b) applies to motions for summary judgment. *See id.* (excluding various motions from Rule 6(b)'s time extension procedures but not listing summary judgment motions); *Buchanan v. Sherrill,* 51 F.3d 227, 228 (10th Cir. 1995) (per curiam) (reviewing a district court's decision to extend time to file summary judgment response under Rule 6(b)(1)).

Federal Heights in reducing the negative effects of sexually oriented businesses." Richardson also testified that the City Council determined again in 1995 that the age restriction on nude dancing would reduce secondary effects. She further testified that the Council's determination is "supported by the studies and information received" after passage of the restriction. The studies referenced by the affidavit are not in the record.

Federal Heights bears the burden at trial of proving that the age restriction furthers its interest in preventing the secondary effects of nude dancing even though nude dancing may still occur. To successfully resist plaintiffs' motion for summary judgment, Federal Heights, as the non-movant who bears the burden of proof at trial, may not rest on its pleadings but must come forth with specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). Richardson's affidavit does not demonstrate that there is a genuine issue for trial on whether the age restriction furthers the city's interest. Mayor Pro Tem Richardson merely opines in a conclusory fashion that the age restriction furthers the city's interest. The affidavit does not provide a factual basis for Richardson's conclusion. This court has held that such an affidavit does not create a genuine issue of material fact. *Murray v. City of Sapulpa,* 45 F.3d 1417, 1422 (10th Cir. 1995) (conclusory affidavits not providing factual bases for their conclusions not sufficient to create fact question); *Hall v. Bellmon,* 935 F.2d 1106, 1111 (10th Cir. 1991) (conclusory, self-serving affidavit does not create fact question). Thus, plaintiffs'

summary judgment motion should have been granted,[15] and section 12-12-11(B) should be stricken.

VI. LICENSING PROVISIONS

In addition to restricting the age of those on the premises, Federal Heights' sexually-oriented business ordinances establish a licensing scheme for such businesses and their employees. In particular, section 12-12-10 requires all employees and managers of adult entertainment establishments to apply for an "employee's license."[16]

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[15] Accordingly, Federal Heights' summary judgment motion should have been denied as to the age restriction. Because the Richardson affidavit does not create a genuine issue of fact, it is not evidence upon which a reasonable jury could return a verdict for Federal Heights. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It was the only evidence offered by Federal Heights, and accepted by the district court, to show that the age restriction furthered its interest in preventing secondary effects. Thus, there was no evidence that would support a jury verdict for Federal Heights. The city, which had the burden of proof at trial, was therefore not entitled to summary judgment. *See Jeffries v. Kansas*, 147 F.3d 1220, 1228 (10th Cir. 1998) (noting that summary judgment proper when "evidence is so one-sided that one party must prevail as a matter of law" (quotation omitted)).

[16] It appears from the record that neither the plaintiff dancers nor any of Essence's employees applied for or were denied an employee license. Nevertheless, plaintiffs have standing to bring a facial challenge to section 12-12-10. "Applying for and being denied a license . . . is not a condition precedent to bringing a facial challenge to an unconstitutional law." *Assoc. of Cmty. Orgs. for Reform Now v. Municipality of Golden*, 744 F.2d 739, 744 (10th Cir. 1984); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988) ("[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official . . . , one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."); *Freedman v. Maryland*, 380 U.S. 51, 55-56 (1965) (plaintiff who did not seek censor's approval had standing to

(Continued on following page)

The Supreme Court has allowed licensing of adult entertainment establishments so long as two classic evils of prior restraints are not present. *FW/PBS,* 493 U.S. at 225-26. First, the licensing scheme may not vest unbridled discretion in the government officials charged with the responsibility of granting or denying the license. *Id.* Second, the licensing scheme may not allow the decision-maker unlimited time to decide on matters affecting the license; otherwise, there is the "risk of indefinitely suppressing speech." *Id.* at 226. To ensure that the decision time is limited, certain procedural safeguards are required. *See id.* at 227; *Freedman,* 380 U.S. at 58-60.

In the adult business licensing context, at least two procedural safeguards are essential: (1) the licensor must make the decision whether to issue the license within a specified and reasonable time period, (2) there must be opportunity for prompt judicial review of the denial of a license. *See FW/PBS,* 493 U.S. at 228; *Freedman,* 380 U.S. at 58-60.[17] Plaintiffs contend that section 12-12-10 does not

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mount facial attack on censorship scheme that had inadequate procedural safeguards).

[17] It is unclear whether a third procedural safeguard, requiring that the censor bear the burden of going to court to justify a license denial, must also be present in adult business licensing schemes. The Supreme Court split sharply over the issue in *FW/PBS. See* 493 U.S. at 229-30 (plurality opinion); *id.* at 239-42 (Brennan, J., concurring in the judgment); *id.* at 244-49 (White, J., concurring in part and dissenting in part); *see also Ward v. County of Orange,* 217 F.3d 1350, 1355 (11th Cir. 2000) (recognizing that a majority of the Supreme Court has not recognized the distinction between adult business licensing schemes and censorship schemes); *11126 Baltimore Blvd., Inc. v. Prince George's County,* 58 F.3d 988, 996 n.12 (4th Cir. 1995) (en banc) ("The splintered opinion of the *FW/PBS* Court leaves the continued application of the third *Freedman* factor subject to some speculation."). We do not reach the issue.

contain these protections.[18] Because section 12-12-10 does not provide for any judicial review following an employee license denial, this court need not address the promptness of administrative and judicial procedures.

Section 12-12-10 provides that an employee license shall issue unless the City Administrator finds one of several grounds of denial. *See supra* note 8. Unlike sections 12-12-6 and 12-12-9, the sections dealing with denial, suspension, and revocation of business licenses, section 12-12-10 lacks any mechanism for review of the City Administrator's decision. There is no provision for a public hearing before the City Council following a license denial. *Compare* Federal Heights Mun. Code ch. XII, art. XII, §§ 12-12-6, -9.[19] In addition, there is no authorization to appeal the City Administrator's decision to a Colorado court. Section 12-12-10 thus fails to provide any opportunity for judicial review and is facially invalid.[20]

VII. SEVERABILITY

Sections 12-12-10 and 12-12-11(B) are facially unconstitutional. Under Colorado law, a section of a legislative

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[18] Plaintiffs also contend, in a single sentence, that section 12-12-10 vests the City Council with overbroad discretion. "Such perfunctory complaints fail to frame and develop an issue sufficient to invoke appellate review." *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994). We will thus not consider the argument.

[19] These provisions are summarized in footnotes 6 and 7.

[20] Plaintiffs also contend that the fees charged for issuance of an employee license constitute an unconstitutional tax on free expression. Because we conclude that the employee licensing requirement is invalid on its face, we need not decide the issue.

enactment is severable if the remaining portion is autonomous and the legislature's will in passing the entire statute is not thwarted by excision. *See City of Lakewood v. Colfax Unlimited Assoc.*, 634 P.2d 52, 70 (Colo. 1981) (en banc). A severability clause creates a presumption that the legislature would have been satisfied with the remaining portions of the enactment. *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 371 (Colo. 1985) (en banc). If the remaining enactment, however, is so "incomplete or riddled with omissions" that it lacks coherence, the entire enactment should be stricken. *Colfax Unlimited*, 634 P.2d at 70.

Sections 12-12-10 and 12-12-11(B) were made part of the municipal code by Ordinances 97-15 and 95-11 respectively. Both ordinances contain a severability clause.[21] Striking sections 12-12-10 and 12-12-11(B) does not render Ordinances 97-15 and 95-11 incoherent since each code amendment made by the ordinances is autonomous. Nor will striking either section render contradictory or incoherent any other provision of the municipal code. We therefore conclude that only section 6 of Ordinance 97-15, the provision enacting the present form of section 12-12-10,

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[21] Section 8 of Ordinance 95-11 and section 10 of Ordinance 97-15 both read:

> If any article, section, paragraph, sentence, clause or phrase of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The city council hereby declares that it would have passed this ordinance and each part or parts hereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

and that portion of section 5 of Ordinance 95-11 enacting the present form of section 12-12-11(B) should be stricken.

VIII. CONCLUSION

We **affirm** the district court's exclusion of the Weaver affidavit. We **affirm in part and reverse in part** the district court's decision with regard to the age restriction. Section 12-12-11(B) is stricken in its entirety. The district court's decision on the constitutionality of section 12-12-10 is **reversed**. The section is stricken in its entirety. The portions of the district court's opinion and order dealing with the plaintiffs' challenge to the disability provisions of sections 12-12-10 and 12-12-6, plaintiffs' other challenges to section 12-12-6, and plaintiffs' challenges to section 12-12-9 should be **vacated** on remand. The district court should then dismiss the portion of plaintiffs' complaint relating to the disability provisions and sections 12-12-6 and 12-12-9.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Richard P. Matsch

Civil Action No. 98-M-71

SANCLUB CORPORATION, a Colorado corporation d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ AND LISA EASTON,

Plaintiffs,

v.

THE CITY OF FEDERAL HEIGHTS,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed June 9, 2000)

MATSCH, Judge

Sanclub Corporation ("Sanclub") owns and operates a business establishment named "The Bare Essence" in the City of Federal Heights, Colorado ("Federal Heights" or "City"), presenting live entertainment including nude dancing. No liquor is served. Under the Federal Heights Municipal Code, section 12-12-1, *et seq.*, Sanclub's business is classified as an "adult entertainment establishment" subject to special licensing requirements challenged in this case as violations of the freedom of expression protected by the First and Fourteenth Amendments of the

United States Constitution and Article VII, Section 1, of the Colorado Constitution.

The two individual plaintiffs are women who were denied employment by Sanclub as dancers solely because they were less than 21 years old when they applied. The ordinances prohibit both employment and patronage by any persons younger than 21 years.

Federal Heights moved for summary judgment of dismissal of all claims. The plaintiffs filed a cross motion for partial summary judgment to declare the challenged provisions invalid and to enjoin their enforcement.

The initial question controlling the analysis of the validity of each of the disputed provisions is whether they are content neutral. If so, the plaintiffs have the burden of overcoming a presumption of validity by showing that the restrictions do not meet the four factors set out in *United States v. O'Brien,* 391 U.S. 367 (1968). If the ordinances are seen as suppressing particular expressive conduct the City must demonstrate that the restrictions are narrowly tailored to serve a compelling government interest under "the most exacting scrutiny." *Boos v. Barry,* 485 U.S. 312, 321 (1988); *Texas v. Johnson,* 491 U.S. 397 (1989).

The Supreme Court decided *City of Erie v. Pap's A.M.,* ___ U.S. ___, 120 S. Ct. 1382 (2000) (upholding a prohibition on public nudity applied to require minimum clothing of women erotic dancers) after oral argument was heard on these motions. Upon request, the parties submitted supplemental briefs on the significance of the holding in that case. As in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1990), there was no majority opinion in *Erie* articulating a clear rationale for concluding that nudity is not a protected component of whatever message is conveyed by

the dancers in adult entertainment establishments. Although Justice Souter said he would require a specific evidentiary record to demonstrate the need to avoid the "secondary effects" of Pap's business, he joined the plurality opinion to the extent that it relied on the holding in *Barnes* that protection of the public health, safety and welfare pushes live adult entertainment to the "outer ambit" of First Amendment protection. Justice Stevens, in a dissenting opinion joined by Justice Ginsburg, observed that the court's ruling dramatically changed prior doctrine upholding locational limits on commercial enterprises featuring indecent entertainment. He contended that *Erie* was the first time the Court approved total suppression of this form of speech on the premise that the prohibition was for the stated purpose of preventing perceived but not proven negative effects on the community. Justice Stevens further said that the Court failed to distinguish between secondary effects caused by speech and incidental effects on speech caused by regulating conduct. *Id.* at 23.

While academics and advocates may rightfully question the plausibility of the Court's view that municipal governments are not engaged in censorship of indecent expression in enacting ordinances directed at live entertainment businesses lower court judges must abide by the Court's holdings that a municipality's efforts to mitigate secondary effects of live sexual entertainment outweigh the First Amendment interests involved. Accordingly, the four factors set forth in *O'Brien* control the constitutionality of each of the provisions of the Federal Heights code at issue and each of the limitations must be analyzed separately.

The background facts of this case are not in dispute. In late 1996, T. Edward Sanchez applied for an adult

entertainment new business license for Sanclub and paid an application fee of $50. Mr. Sanchez died while the application was pending, and a second application was required. It was filed on October 28, 1997. The City issued the license to Sanclub on November 4, 1997. On December 2, 1997, the City passed Ordinance 97-15 and Resolution 97-36, amending the adult business code to require annual licensing of managers and employees who must pay yearly fees.

The impetus for the City's first legislation licensing adult entertainment came in 1993 when a citizen complained to a city council member that pornographic publications were in plain view and accessible to children on a floor rack in a convenience store. The city council considered studies and reports suggesting a relationship between businesses featuring explicit sexual entertainment and crimes together with the decline of property values in areas where such businesses operated in Federal Heights and in other cities. City Council considered the fact that a murder was committed at an adult entertainment business featuring topless performers in Federal Heights in the late 1970's as relevant evidence of the need for special restrictions on that type of business.

The original Ordinance 94-16 enacted in 1994 has been amended several times as a result of court rulings. The plaintiffs' challenges are to the ordinance in its present form. Ordinance 94-16 and all amendments are severable.

The Age Limitation.

Section 12-12-11(B) provides, in relevant part, "it shall be unlawful for any person under twenty-one (21)

years of age to be upon the premises of any adult entertainment establishment which offers live nude dancing."

Colorado has consistently fixed 18 years as the age of adulthood. C.R.S. § 13-22-101 says that "[E]very person, otherwise competent, shall be deemed to be of full age at the age of eighteen years or older . . . [t]o make decisions in regard to his own body and the body of his issue, whether natural or adopted by such person, to the full extent allowed to any other adult person." C.R.S. § 18-7-101(1.5) defines a minor as "a person under eighteen years of age." C.R.S. § 18-6-403(2)(a) prohibiting sexual exploitation of children defines a child as "a person who is less than eighteen years of age."

The Colorado Supreme Court upheld a city ordinance banning all persons under age 21 from live nude dancing clubs in *7250 Corp. v. Board of County Comm'rs,* 799 P.2d 917 (Colo. 1990). That court concluded that nude dancing deserves only limited constitutional protection because any expressive elements are secondary to the conduct itself. *See 7250 Corp.*, 799 P.2d at 922. It applied the four factor *O'Brien* analysis and concluded without elaboration that the age limitation served to protect young people from harmful effects of such establishments and that the incidental restriction on any First Amendment freedoms was no greater than necessary to further that interest. *See id.* at 924-27.

7250 Corp. is definitive and controlling as to the plaintiffs' claims under the Colorado Constitution. It is not persuasive on the First Amendment question because the Colorado court failed to consider whether there is a meaningful difference between persons older than 18 but less than 21 compared with those over 21 and failed to draw

any distinctions between performers and patrons. Nothing in the court's recital of the trial evidence gave any suggestion that young adults over 18 but under 21 are more likely to commit or be victims of crimes seen to be associated with adult entertainment.

In *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272 (Colo. 1995), the Colorado Supreme Court invalidated a broader age restriction prohibiting access to all adult businesses, but *in dictum,* reaffirmed the view that 21-year-old age limitations are reasonable for live, nude dancing clubs, explaining that businesses such as adult bookstores do not involve sexually-oriented "conduct" and therefore deserve more constitutional protection from governmental restriction. *See 2354, Inc.*, 896 P.2d at 287.

To support the age limitation Federal Heights relies, in part, on the following statement from Mayor Pro Tem Sharon Richardson in her affidavit:

> Based on the experience and concerns of the City Council members, we determined, in 1994, that the minimum age requirement of Code § 12-12-11 would assist Federal Heights in reducing the negative effects of sexually oriented businesses. In 1995, we agreed that maintaining the 21-year minimum age requirement for all nude establishments would further reduce the negative effects. This is still true today and supported by the studies and information received subsequent to the 1995 ordinance.

(Def.'s Mot. Summ. J. Ex. A, ¶ 15). The studies and information referred to are not identified in the record.

As performers, the individual plaintiffs in this case are in a different position from patrons. They were both

older then 18 but less than 21 years old when they sought employment as dancers at Sanclub. The First Amendment protects expressive conduct and the Supreme Court has consistently held that erotic dancing is expressive. Thus, the ordinance is a direct denial of the freedom of expression of the two individual plaintiffs only because of their age. These women were adults for all other purposes under Colorado law. Federal Heights has made no showing that restricting the employment of performers to those over 21 has any relationship to the community's interest in avoidance or mitigation of the secondary effects from the operation of adult entertainment establishments. The 21 year-old age limitation is invalid for dancers more than 18 years old.

Limiting the age of the audience is a different matter. There is a qualitative difference between the First Amendment prohibition of governmental restrictions on speech, including expressive conduct, and an asserted right to hear or view the speaker or performer. The Colorado Supreme Court considered only the latter in *7250 Corp.* and concluded that the county commissioners made a legitimate legislative judgment that "youths under 21 years of age should be protected from the potentially harmful consequences associated with [adult] establishments." *7250 Corp.*, 799 P.2d 917, 926.

The right of the plaintiffs to their freedom of expression does not include a right to perform for a particular audience. The age limitation for attendance of the nude performances is only an incidental burden on Sanclub's freedom and is not prohibited by the First Amendment.

Licensing.

Sanclub claims the provisions in sections 12-12-6 and 12-12-9 regulating the issuance, suspension and revocation of adult entertainment licenses are invalid as effecting a prior restraint on protected expression, citing *Near v. Minnesota,* 283 U.S. 697 (1931). In *Freedman v. Maryland,* 380 U.S. 51 (1965), the Supreme Court established three requirements for the validity of prior restraints in the form of film censorship. They must be (1) time limited, (2) provide for a prompt judicial review and (3) the restraining authority must bear the burden of proof that suppression is warranted. *Id.* at 58-60.

Unlike *Freedman,* the Federal Heights' licensing ordinance does not directly censor expression. The Supreme Court applied two of the *Freedman* requirements to an ordinance licensing adult businesses in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990) and held the licensing scheme unconstitutional in multiple opinions. Justice O'Connor, joined by Justices Stevens and Kennedy, found the Dallas ordinance invalid because it contained no time limit for acting on an application for a license and did not provide for prompt judicial review. *Id.* at 227-29. The three justices considered the third *Freedman* factor inapplicable because the Dallas licensing requirement was a "ministerial action" that was not presumptively invalid as content based censorship. Justices Brennan, Marshall, and Blackmun, concurring in the result, agreed with Justice O'Connor's general approach, but would have applied all three of the *Freedman* safeguards. *See id.* at 239-40 (Brennan, J., concurring).

Federal Heights has set a time limit of 14 days for the City to act on an application for an adult business license.

In *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir. 1986), the Ninth Circuit held unconstitutional a five-day waiting period for club operators and exotic dancers. The Fifth Circuit in *T.K.'s Video, Inc., v. Denton County,* 24 F.3d 705, 708 (5th Cir. 1994) approved a waiting period of 60 days. There is no controlling Tenth Circuit case. The 14-day waiting period is reasonable, giving due deference to the City's judgment as to the time required for the necessary administrative procedure and the resources available to it.

The Federal Heights ordinance provides that denial of an application for a license and the suspension or revocation of a license by the city council are subject to judicial review in the district court under Colo. R. Civ. P. 106(a)(4). That rule does not establish a time limit for a judicial ruling and the plaintiffs argue that lack is a fatal flaw in the ordinance.

Although the Tenth Circuit has yet to rule on the issue, courts in other federal circuits are divided on whether the "prompt judicial review" required by *Freedman* means that a final decision must be made within a reasonable time. The Fourth, Sixth and Ninth circuits have said that it does. *See Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County,* 58 F.3d 988 (4th Cir. 1995); *East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220 (6th Cir. 1995). The Fifth and Seventh Circuits are not as restrictive. *Se TK's Video, Inc. v. Denton County,* 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (*en banc*). Judge Niemeyer of the Fourth Circuit Court of Appeals expressed that view well in a concurring and dissenting opinion in these words:

> On the same day that the county denies an application for a special exception, the applicant may obtain access to the [state courts.] I conclude that this is all that is required by the *FW/PBS* safeguard that expeditious review be available. . . . I would interpret that safeguard as requiring only that exit from the executive branch (the administrative permit system) be prompt and that access to the judicial system be immediately available. Since the nature of the safeguard is access to a court, and not the rendering of any given decision of the court, I cannot subscribe to the position that the procedural safeguard requires prompt completion of the judicial review any more than it requires a particular result.

11126 Baltimore Blvd., 58 F.3d at 1002 (4th Cir. 1995) (Neimeyer, J., concurring in part and dissenting in part).

The courts requiring a prompt decision have not explained how a municipal government exercising legislative powers can control the timing of state court action. This court adheres to its view expressed orally at a hearing in *9364 Corp. v. City of Federal Heights*, 96-M-878, on August 29, 1997 that access to an independent review by the state court applying the state rules of civil procedure is all that can be required of a municipal regulation. The timing of a decision by the court is as much within the control and authority of the independent judiciary as is the decision itself. The judges of the Colorado courts have the same duty to apply the protections of the United States Constitution as does this court and it must be assumed that the judge hearing the review will recognize the obligation

under *Freedman* to proceed promptly and to exercise the power to grant a stay or such other temporary relief as may be necessary.

The plaintiffs argue that §§ 12-12-6 and 12-12-9 gives unconstitutionally broad discretion to city officials. Section 12-12-6 states that:

> City Council may deny an application where, after a public hearing, it finds by a preponderance of the evidence that the applicant provided false statements on the application; or failed to provide information reasonalby [sic] necessary for the issuance of a license; or the applicant's premise and use is not in compliance with the applicable provisions of the municipal code; or a corporate applicant is not in good standing with the state; or where, because of an applicant's or any partner's, officer's, director's or stockholders [sic] of more than ten percent (10%) of the outstanding shares or a corporation conviction of a specified criminal act as defined herein in Section 12-12-4(F)(1) or revocation, suspension, denial, or non-renewal of an adult entertainment license, serious criminal conduct would result from the issuance of a license.

The Supreme Court imposed a constitutional restriction on discretion in licensing expressive conduct, holding that it must be exercised within "narrow, objective, and definite standards. . . . " in *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969) (denial of a license to conduct a civil rights protest march). The cases relied on by Sanclub invalidated ordinances essentially without any guidelines, thereby giving complete or near complete discretion to the licensing authority. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769

(1988); *ACORN v. City of Tulsa*, 835 F.2d 735, 740 (10th Cir. 1987).

The plaintiffs contend that denial of a license because the applicant "failed to provide information necessary for the issuance of a license" is too vague to be a meaningful restriction on discretion. The City has accepted the interpretation of this phrase to mean that denial for this reason is limited to the information required by the form of the application and nothing more. That is not vague.

Denial because the "applicant's premises and use is not in compliance with the applicable provisions of the municipal code is problematic if construed to justify denial on any provision that the council decides should be applied to the particular applicant. The language is similar to that found to be unconstitutional in *Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984) where the city sought to license street vending machines for newspapers. The contextual difference, is apparent. The licensing of a business enterprise in a building involves the locational limitations of the zoning laws and the requirements of a building code and fire safety provisions. In context the provision is meaningful and reasonable.

Sanclub challenges the City's authority to deny an application on the ground that a principal has been convicted of a "specified criminal act" and granting or maintaining the license would, in the licensing official's opinion result in "serious criminal conduct." The first phrase requires the licensing authority to consult § 12-12-4(F)(1) listing categories of crimes, including sexual crimes against children, sexual abuse, rape, thirteen specific crimes "connected with another adult entertainment establishment," thirteen additional specific crimes "defined by state

law," "tax violations associated with adult entertainment establishments," and "crimes involving the use of or trafficking narcotic drugs." Although there might be some interpretation involved – e.g., whether a crime involved drug trafficking – the licensing official simply looks at an applicant's criminal record and determines whether the person has committed one or more offenses. The provision is valid.

In *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272 (Colo. 1995), the Colorado Supreme Court held that permitting denial of an adult business license because "[t]he applicant [was] not of good moral character" was unconstitutional. *Id.* at 288. Holding the ordinance was too broad, the court said that "[a] licensing provision prohibiting the ability of an applicant to engage in commercial activities protected by the First Amendment on the basis of prior misconduct can be sustained only on the basis of evidence that serious criminal conduct would result from granting that license." *Id.* at 288.

The second phrase in the City's ordinance provides wide discretion to the licensing official. There is no definition of "serious criminal conduct" and permitting the licensing authority to predict future criminal conduct by any person or persons is the equivalent of finding that such person is not of good moral character. Denial of a license because granting it would result in serious criminal conduct grants uncontrolled discretion and permits the influence of bias, prejudice and completely subjective decisions. That provision is invalid.

Under Section 12-12-9(A), the City Council may suspend a license upon finding that the licensee has "knowingly permitted an unlawful act upon the licensed

premises." The City responds to Sanclub's vagueness argument that the unlawful act must be one of those set out in § 12-12-4(F). That is a reasonable construction in the context of the entire ordinance and is appropriately adopted as a judicial admission which answers the plaintiff's facial challenge.

Sanclub contends that the City may not constitutionally use past criminal conduct to bar convicted persons from expressive conduct under First Amendment protection. In addition to the denial of a license under § 12-12-6 because a principal has been convicted of one of the crimes specified in § 12-12-4(F), § 12-12-10 prevents a person from obtaining a managerial or employee license if he or she has been convicted of any crime specified in § 12-12-4(F) within the last ten years.

The plaintiffs cite *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981). There the Fifth Circuit affirmed the district court in striking down a licensing statute regarding dissemination of religious pamphlets in a public forum. The secondary effects justification for restrictions was not involved.

In *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), the court invalidated an ordinance denying adult bookstore licenses to those previously convicted of one or a number of specified crimes. The Seventh Circuit rejected the city's conclusion that the restriction would reduce crime. *Genusa* predates *Renton, Barnes and Pap's* and the well established law that live adult entertainment businesses present special problems to the residents of municipalities which justify locational, operational and ownership restrictions.

The City points to several recent cases upholding similar ordinances. On point is *Tee & Bee, Inc. v. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996). There the court upheld an ordinance denying adult business licenses if any applicant was convicted of a crime "of moral turpitude, prostitution, obscenity or other sex-related offense within five years preceding the application date. . . . " *Id.* at 1488. The court explained its holding:

> An individual's past actions are very often the best indicator of that person's future actions. Denying licensure to individuals who have recently violated an adult-oriented business ordinance is a reasonable means by which to ensure that those licensed to operate adult businesses will respect and bide by the provisions regulating the business. Likewise, when an individual has been convicted of specified crimes that relate to the "crime-control intent" of the ordinance, a municipality may deny licensure. *Id* at 1489 (citation omitted).

The parties do not dispute that a city can reject a license application because of past criminal conduct. Sanclub contends that Federal Heights must provide factual support for each of the specified disqualifying crimes.

In the preamble to Ordinance No. 97-15, the City refers to court opinions and land use studies concerning the secondary effects of sexually-oriented businesses" around the United States, and makes the following finding:

> the City Counsel finds that the foregoing studies, surveys, cases and material are relevant to the

> issues before the City relating to the adverse secondary effects of adult entertainment establishments which include . . . increases in crimes such as rape, drug-related offenses, prostitution, pandering, exposing minors to harmful materials, possession and distribution of obscene materials, child pornography, [and] violent crimes against persons and property. . . . (Def.'s Resp. Br. Ex. H).

The plurality opinion by Justice O'Connor in *Pap's* supports reliance not only on unspecified studies and reports by other cities it says that the Court's opinions in *Barnes*, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), justify the conclusion that restrictions are necessary because of the secondary effects on the community.

Denial of licensing because of past criminal conduct is reasonably related to the prevention of crimes associted [sic] with live adult entertainment businesses and is, therefore, valid.

Physical Limitations.

The City's ordinance regulates the physical premises of adult business establishments in the following provisions:

> All performances shall take place upon a stage which shall be fixed and immovable. No audience seating shall be permitted within three (3) feet of any edge of the stage. No audience member shall be permitted upon the stage or within three (3) feet of any edge of the stage. F.H.M.C. § 12-12-14(E).

> The premises of all adult entertainment establishments, except adult motion picture theaters, shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access and to provide an illumination of not less than two foot candle of light as measured at the floor level. F.H.M.C. § 12-12-13(B).

These restrictions are reasonably related to the purpose of minimizing secondary effects and are, therefore, valid.

Licensing Fees.

Resolution 97-36 requires managers and performers to pay an annual license fee of either $220 or, if the applicant provides a CBI report, $105. The resolution also imposes an additional tax of $2,000 each year on adult businesses. The plaintiff argue [sic] that the license fee is excessive and conditions the exercise of free speech on an applicant's ability to pay.

The City concedes that these licensing fees must relate to the costs of administering the ordinance and must not unreasonably burden the opportunity to engage in expressive conduct. It relies first on Mayor Pro Tem Sharon Richardson's' affidavit:

> The City Council discussed Resolution 97-36 regarding fees during the December 2, 1997 meeting. It was important to the Council to closely correlate the expense of administering Ordinance 97-15 with the fees charged.

(Def.'s Reply Br., Ex. A, ¶ 9).

To support Mayor Richardson's statement, the City produced two exhibits: a transcript of a City Council meeting on December 2, 1997 at which the fee structure was discussed and a computation of the estimated costs of processing and issuing an adult business license. The estimated costs for an individual license, assuming the applicant provides a copy of a CBI report, are as follows:

Employee	**Hourly Wage**	**Time (Hours)**	**Cost**
Secretary	$15.8	0.25	$3.94
Police Chief	41.9	0.25	10.47
Detective Sgt.	29.8	0.25	7.46
Detective	24.4	1	24.45
City Clerk	28.6	0.25	7.16
City Admin.	44.0	0.17	7.34
SUBTOTAL			**$60.82**
Annual Increase			4.26
License Costs			30.00
Overhead			9.51
TOTAL			**$104.58**

(Def.'s Br. Ex. I). The cost increases to almost $220 if the City must obtain a CBI report. Most of the increase ($98) comes from an additional four hours of detective time. The City maintains it takes a half-day to obtain the reports. *See id.*; Def.'s Reply Br. Ex. A at 137-38.

The plaintiffs offer little to support their contention that the fees are excessive. The burden is on the plaintiffs under *O'Brien* and they have not met that burden.

Disclosure Requirements.

Section 12-12-4 requires disclosure of information as to every applicant, partner, officer, director, and ten percent

shareholder, including names, aliases, residence, current photograph, and percentage share of ownership. The applicant must state whether any of those persons was previously denied an adult license, had one suspended or revoked within the last ten years, and had ever been convicted or pleaded guilty or no contest to any specified crime.

The plaintiffs rely on two cases. The first is *Genusa v. City of Peroria* [sic], 619 F.2d 1203 (7th Cir. 1980). The court upheld several disclosure requirements, namely the applicant's name and address, the exact nature of the adult use to be conducted at the business, and a statement that the applicant is familiar and in compliance with the ordinance. This information, the court held, was legitimately related to the legislative purpose – a "scatter zoning" plan designed to spread the presence of adult businesses throughout the city. *See id.* at 1216. But the court found unconstitutional many other disclosure requirements because the city provided no evidence that they furthered the scatter zoning purpose. *See id.* The court also examined disclosure requirements for all partners, officers, shareholders, etc. and struck them down because there appeared to be "no purpose other than harassment." *See id.* at 1217.

The second case cited by plaintiffs is *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). There the ordinance required license applications to include the names and addresses of all shareholders who voted for the current board of directors. *See id.* at 225. Citing *Genusa* with approval, the Ninth Circuit examined the challenged ordinance to determine whether the information sought was reasonably related to the furtherance of a legitimate and substantial governmental interest in

regulating the protected activity. The court found no logical connection between requiring the shareholders to identify themselves and the city's stated interest in holding the shareholders accountable for violations of the ordinance. *Id.* at 226. The court said that officers and directors, not shareholders, are legally responsible for the management of a corporation's business. *Id.* For these reasons, the court stuck down the shareholder disclosure requirements. *Id.*

More recent cases have found that a municipality's stated interest in combating the negative secondary effects of adult entertainment establishments may justify shareholder disclosure requirements where owners of insignificant interest are protected. In *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), the court cited *Acorn* for the proposition that disclosure requirements encompassing all persons with an ownership interest in an adult business, no matter how small the interest, are "impermissibly broad." 48 F.3d at 226. For that reason, the court found that the disclosure requirements at issue in the case were invalid. *Id.* However, the court noted the lower court had found that the disclosure requirements furthered the city's interest in combating crime, and added:

> We agree that the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business.

East Brooks Books, 48 F.3d at 226. *See also T.K.'s Video v. Denton County*, 830 F. Supp. 335 (E.D. Tex. 1993) (invalidating ordinance mandating disclosure of all shareholders

because it encompassed those shareholders with only a *de minimus* interest).

In *Tee & Bee v. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996), the court upheld disclosure requirements for shareholders with a greater than ten percent interest in an adult business, citing the city's findings that indicated some of the criminal activity associated with adult business is linked to persons involved in such businesses. The court stated:

> Because the City's disclosure provision seeks to control the secondary effects of adult-oriented businesses, its purpose goes beyond mere notice and accountability concerns . . . Unlike the case at bar, the government in [*Acorn Investments*, 887 F.2d at 226] did not articulate a concern about the possibility of owners and shareholders having recent convictions for sex-related offenses.

Tee & Bee, 936 F. Supp. at 1488 n.5.

The *Tee & Bee* court found the ten percent requirement protected shareholders with mere *de minimus* interests while furthering the city's interest in monitoring persons with histories of criminal or regulatory violations who have a more significant stake in adult oriented businesses. *Id.* at 1488. The court added that drawing lines in this way was somewhat arbitrary, but that it believed the city had acted reasonably in limiting the reach of the challenged ordinance to ten percent shareholders. *Id.* at n.6.

As noted earlier, recent U.S. Supreme Court precedent has established that the negative secondary effects of live adult entertainment businesses justify operational

and ownership restrictions. The City in this case has limited the reach of its disclosure requirements to partners, officers and directors who are legally responsible for the operation of a business, and to shareholders with a greater than ten percent ownership interest in a business. These limitations and the disclosure requirements themselves are reasonably related to the City's purpose of combating the criminal activity associated with adult entertainment businesses. Nothing in the record shows that this purpose is furthered by requiring shareholders with a greater than ten percent ownership interest to disclose exactly how much of the business they own. Such a requirement does not add to or change the information about shareholders the City claims it needs to combat secondary effects. That portion of the ordinance is invalid.

Upon the foregoing, it is

ORDERED AND ADJUDGED that Federal Heights Municipal Code, Section 12-12-11(B) is invalid with respect to performers over the age of 18 at adult entertainment establishments offering live nude dancing because it is in violation of the First Amendment to the U.S. Constitution, and it is

FURTHER ORDERED AND ADJUDGED that the last phrase in Federal Heights Municipal Code, Section 12-12-6, "serious criminal conduct would result from the issuance of a license," and the last sentence in Federal Heights Municipal Code, Section 12-12-4(A), "Each individual applicant, partner, director and holder of 10% or more shares of the corporation shall also state the total percentage ownership or shares of the corporation owned or controlled by such person," are invalid because they are

in violation of the First Amendment to the U.S. Constitution, and it is

FURTHER ORDERED the City of Federal Heights is enjoined from the enforcement of these invalid provisions, and it is

FURTHER ORDERED that the Clerk shall enter judgment for this declaratory and injunctive relief under Fed. R. Civ. P. 54(b) because the plaintiffs' claims for damages constitute a separate claim for relief and there is no just reason for delay in the entry of such judgment.

DATED: June 9th, 2000:

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

Case Number: 98-M-71

I certify that I mailed a copy of the attached to the following:

Arthur M. Schwartz
Michael W. Gross
Arthur M. Schwartz, PC
1630 Welton St. #420
Denver, CO 80202

Steven J. Dawes
Griffiths, Tanoue & Light
1512 Larimer St. #550
Denver, CO 80202

Dated: June 12, 2000

JAMES R. MANSPEAKER,
CLERK
By: Glenna Drake
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(Filed March 19, 1999)

Civil Action No. 98-M-71

SANCLUB CORPORATION, a Colorado corporation d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ AND LISA EASTON,

Plaintiffs,

v.

THE CITY OF FEDERAL HEIGHTS,

Defendant.

Minute Order Entered by Chief Judge Richard P. Matsch:

Defendant's motion for leave to file a supplement to the defendant's reply brief filed March 19, 1999 is denied.

Dated: March 19, 1999

Copies of the foregoing were mailed to the following on March 19, 1999:

Arthur M. Schwartz
Michael W. Gross
Arthur M. Schwartz, PC
600 – 17th Street, Suite 2250S
Denver, CO 80202

Steven J. Dawes
Tanya R. Langton
Senter Goldfarb & Rice
P.O. Box 22833
Denver, CO 80222

By: /s/ Jane Trexler
Jane Trexler, Secretary

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SANCLUB CORPORATION, et al.,	:	
Plaintiffs,	:	98 M 71
vs.	:	
CITY OF FEDERAL HEIGHTS,	:	
Defendant.	:	

CROSS MOTIONS FOR SUMMARY JUDGMENT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U. S. District Judge for the District of Colorado, beginning at 3:03 p.m. on the 19th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs:

Michael W. Gross, Esq.
Arthur M. Schwartz, P.C.
1630 Welton Street, #420
Denver, Colorado 80202

For the Defendant:

Steven J. Dawes, Esq.
Senter, Goldfarb & Rice, LLC
400 South Colorado Boulevard 700
Denver, Colorado 80222

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[2] PROCEEDINGS

(At 3:03 p.m. on March 19, 1999, in the United States District Court at Denver, Colorado, before the HONORABLE RICHARD P. MATSCH, U. S. District Judge, with counsel for the parties present, the following proceedings were had:)

THE COURT: Be seated, please. Good afternoon.

This is 98 M 71, Sanclub Corporation, doing business as The Bare Essence, Devona Richelle Lopez and Lisa Easton against the City of Federal Heights. It seems to me I've seen you folks before.

Mr. Gross for the plaintiffs, and Mr. Dawes for the City. We're here on the defendant's motion for summary judgment of dismissal, plaintiffs' motion for partial summary judgment. And a review of these pleadings and the papers filed indicates that there really isn't any material fact issue in the case. We have here licensing requirements of the City, which has two ordinances at issue, and that what we are particularly concerned about here is the minimum age requirement, both for employees and customers, and we have the employee/manager licensing

requirements, which include disclosure requirements, and we have the fees required of the managers and employees.

So I think it's more helpful to hear from plaintiffs' counsel first because of what the challenges are.

MR. GROSS: Thank you, Your Honor.

[3] One preliminary matter. I would just – the City filed today with the Court, I don't know if the Court has received it, it's [sic] supplemental factual information.

THE COURT: I haven't seen anything filed today, no.

MR. GROSS: I have an extra copy for Your Honor, if –

THE COURT: Well, it might be helpful if I see it.

MR. GROSS: And just for the Court's knowledge, we received it at 6:06 last night on our fax.

THE COURT: Let me take a look at it here.

MR. GROSS: Sure.

(Pause.)

THE COURT: Well, what this says, as I understand it from a quick reading, is that there have been violations of the very restrictions that we're talking about.

MR. DAWES: That's correct, Your Honor.

MR. GROSS: Yes.

THE COURT: But you're not seeking enforcement action in this court?

MR. GROSS: No. And, in fact, there's an affidavit from an individual, Jennifer Weaver, as well as an affidavit from the City Manager, Mr. Tinkmanberg (phonetic), and Mr. Tinkmanberg specifically states that the ordinance is not being enforced during the pendency of this case.

THE COURT: Yes.

MR. GROSS: We would simply state our position that we [4] believe this – we would object to the admission, or entry of this – if it's a legal argument, I can understand, but this is a factual argument. It's untimely. The woman, Jennifer Weaver, who gave the affidavit has not been disclosed in any disclosure up to this point. I think it's irrelevant to this hearing, and quite honestly, I –

THE COURT: Well, there hasn't been a challenge to standing of the plaintiffs, and really this would relate, if there were a challenge to standing, it might relate to that more than it does anything else, although I take it from the tenor of this, Mr. Dawes, you're seeking to support your need for the restrictions based on the violations.

MR. DAWES: That's right, Judge, because the Sanclub has only operated for a short period of time. This was empirical evidence of the kind of problems.

THE COURT: Well, I'm not going to rely on it for purposes of this argument.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 98-M-71

SANCLUB CORPORATION, a Colorado corporation, d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ and LISA EASTON,

Plaintiffs,

v.

THE CITY OF FEDERAL HEIGHTS, COLORADO,

Defendant.

AFFIDAVIT OF JENNIFER WEAVER

I, JENNIFER WEAVER, first being duly sworn under oath, depose and state:

1. I am over the age of 18.

2. I worked as a dancer at The Bare Essence from April 12, 1998 to February 2, 1999. While working at The Bare Essence, I observed the following:

a. Bob Savage, the owner of The Bare Essence, and Bobby Sanchez, the general manager, bring alcohol to dancers inside the club.

b. Dancers drink alcohol in the dressing room, including the underage dancers.

c. Bobby Sanchez, when he was the only manager on duty, left the club on numerous occasions to drink at Babe's Country Bar.

d. Dancers smoke marijuana in the dressing room and bathroom.

e. In an employee meeting we were told that it was okay for the dancers to drink alcohol and smoke marijuana in the dressing room.

f. Customers bring alcohol into the club for employees.

g. Some employees have received DUIs and drug possession charges after leaving The Bare Essence.

h. Many employees and customers of The Bare Essence are under the age of 21, and some dancers are under the age of 18.

i. The minimum distance requirement of three feet is not observed in the club. The nude dancers on the main stages step across the three foot distance to balance on the drink rail and receive tips. The dancers perform table dances in a secluded area of the club. The "tables" and chairs in this area can be moved. The dancers perform bikini dances where they touch the customers. The customers are also allowed to touch the dancers. On one occasion, I complained to Bobby Sanchez that a customer had touched my bottom. Bobby Sanchez refused to remove the customer and told me that "these things happen." Bobby Sanchez also told me and the other dancers to get "up close and personal" with the customers. Bobby Sanchez also touched dancers buttocks and approached them while they were nude in the dressing room.

j. Dancers are allowed to touch themselves, their breasts, buttocks and genitals, while on the stage and on the floor.

k. Management allows the customers to masturbate in the club.

l. I have observed girls soliciting private shows outside of the club. I have seen dancers leave and return with customers.

m. I did not feel safe either in the parking lot or inside the club because of the poor lighting and lack of concern for the dancers' safety shown by management.

n. Generally, only one manager worked each shift. Frequently, the only manager was inside an enclosed office or would leave the club altogether.

o. Some of the dancers were concerned about the Federal Heights requirement for a criminal history check, because they had criminal records.

FURTHER AFFIANT SAYETH NOUGHT.

/s/ Jennifer Weaver
Jennifer Weaver

STATE OF COLORADO)
) ss.
COUNTY OF Adams

Subscribed and sworn to before me this 18th day of March, 1999, by Jennifer Weaver.

Witness my hand and official seal.

My Commission expires: 10-1-2001

/s/ Brenda A. Colvin
Notary Public

APPENDIX F

COLORADO REVISED STATUTE

UNLAWFUL ACTS – ENFORCEMENT

12-47-901. Unlawful acts – exceptions. (1) Except as provided in section 18-13-122, C.R.S., it is unlawful for any person:

(a) To sell, serve, give away, dispose of, exchange, or deliver or permit the sale, serving, giving, or procuring of any alcohol beverage to or for any person under the age of twenty-one years, to a visibly intoxicated person, or to a known habitual drunkard;

(b) To obtain or attempt to obtain any alcohol beverage by misrepresentation of age or by any other method in any place where alcohol beverages are sold when such person is under twenty-one years of age;

(c) To possess alcohol beverages in any store, in any public place, including public streets, alleys, roads, or highways, or upon property owned by the state of Colorado or any subdivision thereof, or inside vehicles while upon the public streets, alleys, roads, or highways when such person is under twenty-one years of age;

(d) To knowingly, or under conditions that an average parent or guardian should have knowledge of, suffer or permit any person under twenty-one years of age, of whom such person may be a parent or guardian, to violate the provisions of paragraph (b) or (c) of this subsection (1);

(e) To buy any vinous or spirituous liquor from any person not licensed to sell at retail as provided by this article except as otherwise provided in this article;

(f) To sell at retail any malt, vinous, or spirituous liquors in sealed containers without holding a retail liquor store or liquor-licensed drugstore license;

(g) To manufacture, sell, or possess for sale any alcohol beverage unless licensed to do so as provided by this article or article 46 or 48 of this title and unless all licenses required are in full force and effect;

(h) (I) To consume malt, vinous, or spirituous liquor in any public place except on any licensed premises permitted under this article to sell such liquor by the drink for consumption thereon; to consume any alcohol beverage upon any premises licensed to sell liquor for consumption on the licensed premises, the sale of which is not authorized by the state licensing authority; to consume alcohol beverages at any time on such premises other than such alcohol beverage as is purchased from such establishment; or to consume alcohol beverages in any public room on such premises during such hours as the sale of such beverage is prohibited under this article.

(II) Notwithstanding subparagraph (I) of this paragraph (h), it shall not be unlawful for a person who is at least twenty-one years of age to consume malt, vinous, or spirituous liquors while such person is a passenger aboard a luxury limousine, as defined in section 40-16-101 (3), C.R.S., or a charter or scenic bus, as defined in section 40-16-101 (1.3), C.R.S. Nothing in this subparagraph (II) shall be construed to authorize an owner or operator of a luxury limousine or charter or scenic bus to sell or distribute malt, vinous, or spirituous liquors without obtaining a public transportation system license pursuant to section 12-47-419.

(i) To regularly provide premises, or any portion thereof, together with soft drinks or other mix, ice, glasses, or containers at a direct or indirect cost or charge to any person who brings alcohol beverages upon such premises for the purpose of consuming such beverages on said premises during the hours in which the sale of such beverages is prohibited or to consume such beverages upon premises operated in the manner described in this paragraph (i);

(j) To possess any package, parcel, or container on which the excise tax has not been paid;

(k) With knowledge, to permit or fail to prevent the use of his or her identification, including a driver's license, by a person who is under twenty-one years of age, for the unlawful purchase of any alcohol beverage;

(l) Who is a common carrier regulated under article 10 or 11 of title 40, C.R.S., or is an agent or employee of such common carrier, to deliver alcohol beverages for any person who has not been issued a license or permit pursuant to this article.

(2) It is unlawful for any person licensed as a manufacturer or as a limited winery licensee pursuant to this article or article 46 of this title to manufacture alcohol beverages except in the permanent location specifically designated in the license for such manufacture.

(3) (a) It is unlawful for any person to import or sell any imported alcohol beverage in this state unless such person is the primary source of supply in the United States for the brand of such liquor to be imported into or sold within this state and unless such person holds a valid

importer's license issued under the provisions of this article.

(b) If it is determined by the state licensing authority, in its discretion, as not constituting unfair competition or unfair practice, any importer may be authorized by said state licensing authority to import and sell under and subject to the provisions of such importer's license any brand of alcohol beverage for which he or she is not the primary source of supply in the United States if such licensee is the sole source of supply of that brand of alcohol beverage in the state of Colorado and such authorization is determined by the state licensing authority as not constituting a violation of section 12-47-308.

(c) Any such manufacturer or importer shall, at least thirty days before the importation or sale of any such alcohol beverage in this state, file with the state licensing authority notice of intent to import one or more specified brands of such beverage, together with a statement that such manufacturer or importer is the primary source of supply in the United States for any such brand, unless exempted pursuant to paragraph (b) of this subsection (3), in which case, a statement that such manufacturer or importer is the sole source of supply of that brand of beverage in the state of Colorado, and, upon the request of the state licensing authority, a copy of the manufacturer's federal brand label approval form as required by the federal bureau of alcohol, tobacco, and firearms. Thereafter, said licensee shall file with the state licensing authority a copy of each sales invoice with a monthly sales report as required by section 12-47-503 (4) and (5).

(d) As used in this subsection (3), the term "primary source of supply in the United States" means the manufacturer, the producer, the owner of such alcohol beverage at the time it becomes a marketable product, the bottler in the United States, or the exclusive agent within the United States, or any of the states, of any such manufacturer, producer, owner, or bottler outside the United States. To be the "primary source of supply in the United States", the said manufacturer or importer must be the first source, such as the manufacturer or the source closest to the manufacturer, in the channel of commerce from which the product can be secured by Colorado alcohol beverage wholesalers.

(e) It is unlawful for any person licensed as an importer of alcohol beverages pursuant to this article to deliver any such beverages to any person not in possession of a valid wholesaler's license.

(4) It is unlawful for any person licensed to sell at wholesale pursuant to this article or article 46 of this title:

(a) To peddle malt, vinous, or spirituous liquor at wholesale or by means of a truck or other vehicle if the sale is consummated and delivery made concurrently, but nothing in this paragraph (a) shall prevent delivery from a truck or other vehicle of orders previously taken;

(b) To deliver fermented malt beverages or malt liquors to any retail licensee located outside the geographic territory designated on the license application filed with the state licensing authority if such person holds a wholesaler's beer license;

(c) To purchase or receive any alcohol beverage from any person not licensed pursuant to this article or article 46 of this title, unless otherwise provided in this article;

(d) To sell or serve any alcohol beverage to consumers for consumption on or off the licensed premises during any hours retailers are prohibited from selling or serving such liquors pursuant to subsection (5) of this section.

(5) It is unlawful for any person licensed to sell at retail pursuant to this article:

(a) (I) To sell an alcohol beverage to any person under the age of twenty-one years, to a habitual drunkard, or to a visibly intoxicated person, or to permit any alcohol beverage to be sold or dispensed by a person under eighteen years of age, or to permit any such person to participate in the sale or dispensing thereof. If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article or article 46 of this title. Notwithstanding any provision in this subparagraph (I) to the contrary, no person under twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors unless he or she is supervised by another person who is on premise and has attained twenty-one years of age. No employee of a tavern licensed pursuant to section 12-47-412, that does not regularly serve meals as defined in section 12-47-103 (19), or a retail liquor store shall sell malt, vinous, or spirituous liquors unless such person is at least twenty-one years of age.

(II) (A) If a licensee or a licensee's employee has reasonable cause to believe that a person is under twenty-one years of age and is exhibiting fraudulent proof of age in an attempt to obtain any alcohol beverage, the licensee or employee shall be authorized to confiscate such fraudulent proof of age, if possible, and shall, within seventy-two hours after the confiscation, turn it over to a state or local law enforcement agency. The failure to confiscate such fraudulent proof of age or to turn it over to a state or local law enforcement agency within seventy-two hours after the confiscation shall not constitute a criminal offense, notwithstanding section 12-47-903(1)(a).

(B) If a licensee or a licensee's employee believes that a person is under twenty-one years of age and is exhibiting fraudulent proof of age in an attempt to obtain any alcohol beverage, the licensee or the licensee's employee or any peace or police officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may detain and question such person in a reasonable manner for the purpose of ascertaining whether the person is guilty of any unlawful act under this section. Such questioning of a person by a licensee or a licensee's employee or a peace or police officer does not render the licensee, the licensee's employee, or a peace or police officer civilly or criminally liable for slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention.

(III) Each licensee shall display a printed card that contains notice of the provisions of this paragraph (a).

(IV) Any licensee or licensee's employee acting in good faith in accordance with the provisions of subparagraph (II) of this paragraph (a) shall be immune from any

liability, civil or criminal; except that a licensee or employee acting willfully or wantonly shall not be immune from liability pursuant to subparagraph (II) of this paragraph (a).

(b) To sell, serve, or distribute any malt, vinous, or spirituous liquors at any time other than the following:

(I) For consumption on the premises on any day of the week, except between the hours of 2 a.m. and 7 a.m.;

(II) In sealed containers, on Monday through Saturday, beginning at 8 a.m. until 12 midnight each day; except that, for a limited winery licensee, sales of vinous liquors in sealed containers or by the glass shall be permitted on Sunday beginning at 8 a.m. until 12 midnight. No malt, vinous, or spirituous liquors shall be sold, served, or distributed in a sealed container on Christmas day.

(c) Except as provided in section 18-13-122, C.R.S., it is unlawful for any person to sell fermented malt beverages to any person under the age of twenty-one years or to any person between the hours of 12 midnight and 5 a.m.;

(d) To offer for sale or solicit any order for vinous or spirituous liquors in person at retail except within the licensed premises;

(e) To have in possession or upon the licensed premises any alcohol beverage, the sale of which is not permitted by said license;

(f) To buy any alcohol beverages from any person not licensed to sell at wholesale as provided by this article except as otherwise provided in this article;

(g) To sell at retail alcohol beverages except in the permanent location specifically designated in the license for such sale;

(h) To fail to display at all times in a prominent place a printed card with a minimum height of fourteen inches and a width of eleven inches with each letter to be a minimum of one-half inch in height, which shall read as follows:

WARNING

IT IS ILLEGAL TO SELL WHISKEY, WINE, OR BEER TO ANY PERSON UNDER TWENTY-ONE YEARS OF AGE AND IT IS ILLEGAL FOR ANY PERSON UNDER TWENTY-ONE YEARS OF AGE TO POSSESS OR TO ATTEMPT TO PURCHASE THE SAME.

IDENTIFICATION CARDS WHICH APPEAR TO BE FRAUDULENT WHEN PRESENTED BY PURCHASERS MAY BE CONFISCATED BY THE ESTABLISHMENT AND TURNED OVER TO A LAW ENFORCEMENT AGENCY.

IT IS ILLEGAL IF YOU ARE TWENTY-ONE YEARS OF AGE OR OLDER FOR YOU TO PURCHASE WHISKEY, WINE, OR BEER FOR A PERSON UNDER TWENTY-ONE YEARS OR AGE.

FINES AND IMPRISONMENT MAY BE IMPOSED BY THE COURTS FOR VIOLATION OF THESE PROVISIONS.

(i) To sell malt, vinous, or spirituous liquors in a place where the same are to be consumed, unless such place is a hotel restaurant, tavern, racetrack, club, retail

gaming tavern, or arts licensed premises or unless such place is a dining, club, or parlor car; plane; bus; or other conveyance or facility of a public transportation system;

(j) To display or cause to be displayed, on the licensed premises, any exterior sign advertising any particular brand of malt liquors unless the particular brand so designated in the sign is dispensed on draft or in sealed containers within the licensed premises wherein the sign is displayed;

(k) To have on the licensed premises, if licensed as a retail liquor store or liquor-licensed drugstore, any container that shows evidence of having once been opened or that contains a volume of liquor less than that specified on the label of such container; except that a person holding a retail liquor store or liquor-licensed drugstore license, may have upon the licensed premises malt, vinous, or spirituous liquors in open containers, when the open containers were brought on the licensed premises by and remain solely in the possession of the sales personnel of a person licensed to sell at wholesale pursuant to this article for the purpose of sampling malt, vinous, or spirituous liquors by the retail licensee only. Nothing in this paragraph (k) shall apply to any liquor-licensed drugstore where the contents, or a portion thereof, have been used in compounding prescriptions.

(l) To employ or permit, if such person is licensed to sell alcohol beverages for on-premises consumption or is the agent or manager of said licensee, any employee, waiter, waitress, entertainer, host, hostess, or agent of said licensee to solicit from patrons in any manner, for himself or herself or for any other employee, the purchase of any food, beverage, or any other thing of value;

(m) To require a wholesaler to make delivery to any premises other than the specific hotel and restaurant premises where the malt, vinous, or spirituous liquor is to be sold and consumed if such person is a hotel and restaurant licensee or the registered manager of a hotel and restaurant license requires such delivery;

(n) (I) To authorize or permit any gambling, or the use of any gambling machine or device, except as provided by the "Bingo and Raffles Law", article 9 of this title. The provisions of this paragraph (n) shall not apply to those activities, equipment, and devices authorized and legally operated pursuant to articles 47.1 and 60 of this title.

(II) Any person who violates any provision of this paragraph (n) is guilty of a class 5 felony and, upon conviction thereof, shall be punished as provided in section 18-1-105, C.R.S.

(6) It is unlawful for any importer, manufacturer, or brewer to sell or to bring into this state for purposes of sale any fermented malt beverage or any malt liquor without causing the same to be unloaded and placed in the physical possession of a licensed wholesaler at the wholesaler's licensed premises in this state and to be inventoried for purposes of tax collection prior to delivery to a retailer or consumer.

(7) It is unlawful for any person licensed pursuant to this article or article 46 of this title to give away fermented malt beverages for the purpose of influencing the sale of any particular kind, make, or brand of any malt beverage and to furnish or supply any commodity or article at less than its market price for said purpose, except advertising material and signs.

(8) It is unlawful for any manufacturer or wholesaler licensed pursuant to article 46 of this title to sell, deliver, or cause to be delivered to any retail licensee any beverage containing alcohol in excess of three and two-tenths percent by weight or four percent by volume, or for any fermented malt beverage retailer to sell, possess, or permit the consumption on the premises of any of the beverages containing alcohol in excess of three and two-tenths percent by weight or four percent by volume, or for any fermented malt beverage retail licensee to hold or operate under any license for the sale of any beverages containing alcohol in excess of three and two-tenths percent by weight or four percent by volume for the same premises. Any violation by any fermented malt beverage licensee of the provisions of this subsection (8) shall immediately cause the cancellation of the license granted under this article.

(9) It is unlawful for a retail gaming tavern licensee to knowingly permit the removal of an alcohol beverage from a licensed premises that is licensed only for on-premises consumption of alcohol beverages. A retail gaming tavern licensee shall not be charged with permitting the removal of an alcohol beverage from the licensed premises when the license has either:

(a) Stationed personnel at each exit used by the public in order to prevent the removal of an alcohol beverage from the premises; or

(b) Posted a sign at least twelve inches wide and eighteen inches high by each exit used by the public that contains the following notice in type that is at least one-half inch in height:

"WARNING

DO NOT LEAVE THE PREMISES OF THIS ESTABLISHMENT WITH AN ALCOHOL BEVERAGE.

IT IS ILLEGAL TO CONSUME AN ALCOHOL BEVERAGE IN A PUBLIC PLACE.

A FINE OF UP TO $250 MAY BE IMPOSED BY THE COURTS FOR A VIOLATION OF THIS PROVISION."

APPENDIX G

COLORADO REVISED STATUTE

§ 18-13-122. Illegal possession or consumption of ethyl alcohol by an underage person. (1) As used in this section, unless the context otherwise requires:

(a) "Establishment" means a business, firm, enterprise, service or fraternal organization, club, institution, entity, group, or residence, and any real property, including buildings and improvements, connected therewith, and shall also include any members, employees, and occupants associated therewith.

(b) "Ethyl alcohol" means any substance which is or contains ethyl alcohol.

(c) "Possession of ethyl alcohol" means that a person has or holds any amount of ethyl alcohol anywhere on his person, or that a person owns or has custody of ethyl alcohol, or has ethyl alcohol within his immediate presence and control.

(d) "Private property" means any dwelling and its curtilage which is being used by a natural person or natural persons for habitation and which is not open to the public and privately owned real property which is not open to the public. "Private property" shall not include:

(I) Any establishment which has or is required to have a license pursuant to article 46, 47, or 48 of title 12, C.R.S.; or

(II) Any establishment which sells ethyl alcohol or upon which ethyl alcohol is sold; or

(III) Any establishment which leases, rents, or provides accommodations to members of the public generally.

(2) (a) Any person under twenty-one years of age who possesses or consumes ethyl alcohol anywhere in the state of Colorado commits illegal possession or consumption of ethyl alcohol by an underage person. Illegal possession or consumption of ethyl alcohol by an underage person is a strict liability offense.

(b) Illegal possession or consumption of ethyl alcohol by an underage person shall be punished by a fine of not more than one hundred dollars. The court, upon sentencing a defendant pursuant to this paragraph (b), may, in addition to any fine, order that the defendant perform up to twenty-four hours of useful public service, subject to the conditions and restrictions of section 16-11-701, C.R.S., and may further order that the defendant submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program at such defendant's own expense.

(3) It shall be an affirmative defense to the offense described in subsection (2) of this section that the ethyl alcohol was possessed or consumed by a person under twenty-one years of age under the following circumstances:

(a) While such person was legally upon private property with the knowledge and consent of the owner or legal possessor of such private property and the ethyl alcohol was possessed or consumed with the consent of his parent or legal guardian who was present during such possession or consumption; or

(b) When the existence of ethyl alcohol in a person's body was due solely to the ingestion of a confectionery which contained ethyl alcohol within the limits prescribed by section 25-5-410 (1) (i) (II), C.R.S.; or the ingestion of any substance which was manufactured, designed, or intended primarily for a purpose other than oral human ingestion; or the ingestion of any substance which was manufactured, designed, or intended solely for medicinal or hygienic purposes; or solely from the ingestion of a beverage which contained less than one-half of one percent of ethyl alcohol by weight.

(4) The possession or consumption of ethyl alcohol shall not constitute a violation of this section if such possession or consumption takes place for religious purposes protected by the first amendment to the United States constitution.

(5) Prima facie evidence of a violation of subsection (2) of this section shall consist of:

(a) Evidence that the defendant was under the age of twenty-one years and possessed or consumed ethyl alcohol anywhere in this state; or

(b) Evidence that the defendant was under the age of twenty-one years and manifested any of the characteristics commonly associated with ethyl alcohol intoxication or impairment while present anywhere in this state.

(6) During any trial for a violation of subsection (2) of this section, any bottle, can, or any other container with labeling indicating the contents of such bottle, can, or container shall be admissible into evidence, and the information contained on any label on such bottle, can, or other container shall be admissible into evidence and shall

not constitute hearsay. A jury or a judge, whichever is appropriate, may consider the information upon such label in determining whether the contents of the bottle, can, or other container were composed in whole or in part of ethyl alcohol. A label which identifies the contents of any bottle, can, or other container as "beer", "ale", "malt beverage", "fermented malt beverage", "malt liquor", "wine", "champagne", "whiskey" or "whisky", "gin", "vodka", "tequila", "schnapps", "brandy", "cognac", "liqueur", "cordial", "alcohol", or "liquor" shall constitute prima facie evidence that the contents of the bottle, can, or other container was composed in whole or in part of ethyl alcohol.

(7) A parent or legal guardian of a person under twenty-one years of age or any natural person who has the permission of such parent or legal guardian may give or permit the possession and consumption of ethyl alcohol to or by a person under the age of twenty-one years under the conditions described in paragraph (a) of subsection (3) of this section. This subsection (7) shall not be construed to permit any establishment which is or is required to be licensed pursuant to article 46, 47, or 48 of title 12, C.R.S., or any members, employees, or occupants of any such establishment to give, provide, make available, or sell ethyl alcohol to a person under twenty-one years of age.

(8) Nothing in this section shall be construed to prohibit any statutory or home rule municipality from enacting any ordinance which prohibits persons under the age of twenty-one years from possessing or consuming ethyl alcohol, which ordinance is at least as restrictive or more restrictive than this section.

(9) Nothing in this section shall be construed to limit or preclude prosecution for any offense pursuant to article

46, 47, or 48 of title 12, C.R.S., except as provided in such articles.

(10) Upon the expiration of one year from the date of a conviction for a violation of subsection (2) of this section, any person convicted of such violation may petition the court in which the conviction was entered for an order sealing the record of such conviction. The court shall grant such petition if the petitioner has not been arrested for, charged with, or convicted of any felony, misdemeanor, or petty offense during the period of one year following the date of such petitioner's conviction for a violation of subsection (2) of this section.

(11) The qualitative result of an alcohol test or tests shall be admissible at the trial of any person charged with a violation of subsection (2) of this section upon a showing that the device or devices used to conduct such test or tests have been approved as accurate in detecting alcohol by the executive director of the department of public health and environment.

(12) Official records of the department of public health and environment relating to the certification of breath test instruments, certification of operators and operator instructors of breath test instruments, certification of standard solutions, and certification of laboratories shall be official records of the state. Copies of such records, attested by the executive director of the department of public health and environment or his deputy and accompanied by a certificate bearing the official seal for said department, which state that the executive director of the department has custody of such records, shall be admissible in all courts of record and shall constitute prima facie evidence of the information contained in such records. The

official seal of the department described in this subsection (12) may consist of a rubber stamp producing a facsimile of the seal stamped upon the document.

(13) In any judicial proceeding in any court of this state concerning a charge under subsection (2) of this section, the court shall take judicial notice of methods of testing a person's blood, breath, saliva, or urine for the presence of alcohol and of the design and operation of devices certified by the department of public health and environment for testing a person's blood, breath, saliva, or urine for the presence of alcohol. This subsection (13) shall not prevent the necessity of establishing during a trial that the testing devices were working properly and that such testing devices were properly operated. Nothing in this subsection (13) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(14) No law enforcement officer shall enter upon any private property to investigate any violation of this section without probable cause.

(15) Repealed.

APPENDIX H

CHAPTER XII
LICENSES REQUIRED

ARTICLE XII	ADULT ENTERTAINMENT ESTABLISHMENTS
12-12-1	Legislative Intent
12-12-2	Definitions
12-12-3	License Required
12-12-4	Application
12-12-5	Application and License Fees
12-12-6	Investigation – Application Review
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12-12-14	Standards of Conduct – Live Performances or Performers
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12-12-1 Legislative Intent.

It is the intent of this Ordinance to impose reasonable time, place and manner restrictions upon adult entertainment establishments to serve the substantial government interest of protecting and preserving the quality and vitality of the City and its citizens and not to prohibit adult entertainment nor constitutionally protected speech.

12-12-2 Definitions.

A. *Adult Entertainment Establishment:* An adult arcade, adult bookstore, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment, all as defined herein, or other similar business, and includes:

1. The opening or commencement of any adult entertainment establishment as a new business;

2. The conversion of an existing business to an adult entertainment establishment;

3. The addition of an adult entertainment establishment to any existing adult entertainment establishment;

4. The relocation of any adult entertainment establishment; or

5. The continuation of any adult entertainment establishment.

B. *Adult Arcade:* Any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projections or other image-producing devices are maintained to show images which are distinguished or characterized by the depicting or describing of specified sexual activities or specified anatomical areas.

C. *Adult Bookstore or Adult Video Store:* A business having as a substantial and significant portion of its stock and trade, revenues, space or advertising expenditures, resulting from the sale, renting or viewing of one or more of the following:

1. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, laser discs, slides or other visual representations which depict or describe specified sexual activities or specified anatomical areas; or

2. Instruments, devices, or paraphernalia which are designed for specified sexual activities.

D. *Adult Cabaret:* A nightclub, bar, restaurant or similar business which regularly features:

1. Persons who appear in a state of nudity;

2. Live performances which are characterized by the exposure of specified anatomical areas or by specified sexual activities; or

3. Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

E. *Adult Motel:* A hotel, motel or similar business which offers private rooms to the public and provides patrons live performances or closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

F. *Adult Motion Picture Theater:* A business where films, motion pictures, video cassettes, slides or similar photographic reproductions are regularly shown which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

G. *Adult Theater:* A theater, concert hall, auditorium, or similar business which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of specified anatomical areas or by specified sexual activities.

H. *Sexual Encounter Establishment:* A business or commercial establishment which, as one of its primary business purposes, offers, for any form of consideration, a place where two (2) or more persons may congregate, associate or consort for the purpose of specified sexual activities or the exposure of specified anatomical areas, when one or more of the persons exposes any specified anatomical area.

I. *Adult Material:* Means books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions laser discs, slides or other visual representations which depict or describe specified sexual activities or specified anatomical areas, or instruments, devices, or paraphernalia which are designed for specified sexual activities.

J. *Employee:* Includes any person who is paid by the licensee for services performed on the premises whether such person would otherwise, as a matter of law, be classified as an employee, agent, manager, entertainer or independent contractor.

K. *Manager:* Any person other than a licensee who is employed by an adult entertainment establishment to act as manager or supervisor of the employees, finances, patrons of the establishment or is otherwise responsible for operation of the establishment.

L. *Specified Anatomical Areas:*

1. Less than completely and opaquely covered: human genitals, pubic region, buttocks and female breast below a point above the top of the areola; and

2. Human male genitals in a discernable turgid state even if completely and opaquely covered.

M. *Specified Sexual Activities:* Means acts, simulated acts, exhibitions, representations, depictions or descriptions of:

1. Human genitals in a state of sexual stimulation or arousal;

2. Fondling or other erotic touching of human genitals, pubic region, buttocks or female breast;

3. Intrusion, however slight, of any object, any part of an animal's body, or any part of a person's body into the genital or anal openings of any person's body or into the body of an animal;

4. Cunnilingus, fellatio, analingus, masturbation, bestiality, lewd exhibition of genitals or excretory function;

5. Flagellation, mutilation or torture for purposes of sexual arousal, gratification or abuse.

12-12-3 License Required.

It shall be unlawful for any person to engage in the business of an adult entertainment establishment without having first obtained a license therefore from the City as set forth in this Article.

12-12-4 Application.

An Applicant for a license under this Article must file with the City Clerk an application, provided by the City Clerk, which application shall include the following:

A. The legal names, any aliases, residence and current photograph of passport size and quality of each individual applicant, partner, director and holder of ten percent (10%) or more of the shares of the corporation.

B. The trade name of the applicant. If the applicant is a corporation, a copy of authority to do business in Colorado, including articles of incorporation, agent for service or process, and trade name affidavit, if any.

C. A written statement from the applicant listing the proposed types of adult entertainment to be offered at the establishment.

D. (Repealed)

E. Whether the applicant, any partners, officers, directors or stockholders holding more than ten percent (10%) of the outstanding shares of the corporation have, within ten (10) years from the date of the application, had any adult entertainment establishment license requested or issued from any other governmental entity denied, suspended, revoked or not renewed and if so, the name and address of such establishment and dates and reasons for such denial, suspension, revocation or non-renewal.

F. If the applicant, any partners, officers, directors or stockholders holding more than ten percent (10%) of the outstanding shares of the corporation has, within ten (10) years from the date of the application, ever been convicted or pled guilty or no contest to any specified criminal acts

as defined herein and, if so, a complete description of any such offense; including date of violation, date of conviction, jurisdiction and any disposition, including any fine or sentence imposed and whether the terms of any sentence have been fully completed.

1. For the purposes of this subsection, *specified criminal acts* means acts which include sexual crimes against children, sexual abuse, rape, distribution of obscenity, sale, distribution or display of harmful material to a minor, prostitution, promotion of prostitution, aggravated promotion of prostitution, compelling prostitution, sexual performance by a child, possession of child pornography, public lewdness, indecent exposure, indecency with a child, and, as defined by state law, organized criminal activity, sexual assault, aggravated sexual assault, incest, solicitation of a child, harboring a runaway child, kidnapping, aggravated kidnapping, robbery, aggravated robbery, bribery, felony violation of the Colorado Controlled Substances Act or Dangerous Drugs Act, or tax violations associated with adult entertainment establishments, or crimes involving the use of or trafficking narcotic drugs.

G. A floor plan of the proposed premises. The floor plan shall designate those rooms or other areas of the premises where patrons are not permitted and shall also designate the use of each room or other area of the premises. The floor plan need not be professionally prepared, but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises. The plan shall designate the place at which the license will be conspicuously posted and the location of any stage.

H. Address of the premises to be licensed.

I. Each application for an adult entertainment establishment license shall be verified and acknowledged under oath to be true and correct. Each applicant shall have a continuing duty to report, in writing, to the City Clerk, any change regarding the information required in this Section within thirty (30) days of such change.

12-12-5 Application and License Fees.

A. Each applicant shall, at the time of submitting an application, pay a non-refundable application fee. Additionally, each individual applicant, partner, officer, director or stockholder holding more than ten percent (10%) of the outstanding shares of the corporation shall pay a non-refundable application fee. Such fee shall be reduced for each individual who, at their own expense, provides a current criminal history obtained from the Colorado Bureau of Investigation. All application fees shall be prescribed by resolution in accordance with Section 1-1-10 of the Code.

B. Each applicant shall at the time of submitting an application pay an annual license fee, the amount of which shall be as prescribed by Resolution in accordance with Section 1-1-10. Such fee to be prorated based upon the date of issuance of the license. If a license is not issued, the license fee shall be returned in full to the applicant.

C. No application fee shall be charged on a renewal of an existing license; however, any change in ownership of an adult entertainment establishment shall require submission of a new application, application fee and license.

12-12-6 Investigation – Application Review.

Upon receipt of a properly completed application as determined by the City Clerk, the City Clerk shall refer the application for investigation to the Police Department and to the City's Building Inspector and Fire Chief who shall inspect the applicant's premise for compliance with the applicable provisions of the municipal code. The Police Department, Building Inspector and Fire Chief shall furnish the results of their investigations and inspections to the City Administrator. The City Administrator shall, within thirty (30) day from the City Clerk's receipt of a completed application, either grant the license or inform the applicant in writing that there is probable cause to believe that one or more of the grounds for denial as set forth in the second paragraph of this section exist and that the matter shall be set for a public hearing before City Council. Such hearing shall be held within twenty (20) days of the City Administrator's notice to the applicant. The hearing shall be held in accordance with the procedure set forth in Section 12-12-9(C) of this Article.

City Council may deny an application where, after a public hearing, it finds by a preponderance of the evidence that the applicant provided false statements on the application; or failed to provide information reasonably necessary for the issuance of a license; or the applicant's premises and use is not in compliance with the applicable provisions of the municipal code; or a corporate applicant is not in good standing with the state; or where, because of an applicant's or any partner's, officer's, director's or stockholder's of more than ten percent (10%) of the outstanding shares of a corporation conviction of a specified criminal act as defined herein in Section 12-12-4(F)(1), or revocation, suspension, denial or non-renewal of an adult

entertainment license, specified criminal offense would result from the issuance of a license.

If an application is denied, the applicant shall be notified of such in writing by the City Administrator within ten (10) days of the public hearing. The notice shall specify the grounds for denial and City Council's findings regarding same. City Council's decision may be appealed as provided in Rule 106(A)(4) of the Colorado Rules of Civil Procedure (C.R.C.P.).

12-12-7 Transfer – Prohibited.

No license issued in accordance with this Article may be transferred or assigned.

12-12-8 Posting of License.

Each license issued in accordance with this Article shall be posted on the licensed premise in a conspicuous location open to public view.

12-12-9 Suspension and Revocation.

A. City Council shall suspend an adult entertainment license for a period not to exceed six (6) months or may revoke a license if City Council, after a public hearing, finds that a licensee or a licensee's employee(s) have violated or are not in compliance with any provision of this Article, refused to allow an inspection of the premises as authorized by this Article or knowingly permitted an unlawful act upon the licensed premises.

B. City Council shall revoke an adult entertainment license if City Council, after a public hearing, finds the

license has been suspended within the preceding twelve (12) months, or the licensee has provided false information in the application process, or where a licensee or employee has knowingly allowed the possession use or sale of controlled substances as defined in Part 3 of Article 22 of Title 12 of the Colorado Revised Statutes (C.R.S.) on the licensed premises, prostitution on the licensed premises, operated an adult entertainment establishment when such establishment's license was suspended or allowed any act of sexual intercourse, sodomy, oral copulation, masturbation or other sexual conduct to occur on the licensed premises.

C. Public hearings, as set forth in this Article, shall be conducted in compliance with due process requirements, including, without limitation, written notice of charges, violations, hearing dates and decisions, issuance of subpoenas and oaths by the City Clerk, representation of the applicant or licensee by legal counsel if so desired, presentation of evidence and witnesses, examination and cross examination of evidence and witnesses, presentation of rebuttal evidence or testimony and preservation of the hearing by recording or written transcript.

D. The City shall have the burden of showing sufficient cause to suspend or revoke an adult entertainment license by a preponderance of the evidence.

E. Public Hearings, as provided within this Section, shall be held within twenty (20) days after notice of same to the licensee. The City Administrator shall notify the licensee in writing of City Council's decision within ten (10) days after the hearing. If a license is suspended or revoked, the notice shall specify the grounds for denial,

City Council's findings regarding same and the effective dates for such suspension or revocation.

City Council's decision may be appealed as provided in Rule 106(A)(4) C.R.C.P..

12-12-10 Manager and Employees License Required.

A. Every employee of an adult entertainment establishment, including all managers, shall submit an application for an employee's license on a form provided by the City. The application shall include the employee's full name, aliases, if any, current residence, current photograph of passport size and quality, telephone number and date of birth.

B. Application shall be forwarded to the Federal Heights Police Department for investigation. The investigation shall be completed within fourteen (14) days from the date a completed application is filed. After investigation, a license shall issue unless the City Administrator determines that:

1. The applicant has made false, misleading or fraudulent statement of material fact in the application process; or

2. The applicant has failed to provide the information required by this Section; or

3. The applicant has failed to pay the required annual license fee; or

4. The applicant has been convicted within the last ten (10) years of any specified criminal offense as defined in Section 12-12-4(F)(1) herein; or

5. The applicant has had an adult entertainment establishment employee license revoked by the City or any other governmental entity within five (5) years from the date of the current application.

6. A license granted pursuant to this Section shall be subject to annual renewal by the City upon the written application of the applicant and a finding that the applicant has not been convicted of any specified criminal act or committed any act during the existence of the previous license period which would be grounds to deny the initial application.

7. License fees are due in full at the time of application and shall be returned in full to an applicant if a license is not issued. Such fee shall be reduced for applicants who provide a current criminal history, obtained from the Colorado Bureau of Investigation. All license fees shall be prescribed by resolution in accordance with Section 1-1-10 of the Code.

C. It shall be unlawful for any licensee to employ, or for any person to work as, a manager or employee of an adult entertainment establishment without such person having a valid adult entertainment manager license or employee license.

12-12-11 Minimum Age Requirements.

A. It shall be unlawful for any person under eighteen (18) years of age to be upon the premises of any adult entertainment establishment.

B. Additionally, it shall be unlawful for any person under twenty-one (21) years of age to be upon the premises

of any adult entertainment establishment which offers live nude dancing. For purposes of this Article, ***nude*** means as defined in Section 6-1-1(34) of the Code.

12-12-12. Hours.

It shall be unlawful for any adult cabaret, adult theater, or sexual encounter establishment to offer live performances after 2:00 a.m. and before 7:00 a.m. each calendar day.

12-12-13 Lighting Requirements.

A. All off-street parking areas and premises entries of adult entertainment establishments shall be illuminated from dusk to closing hours of operation with a lighting system which provides an average maintained horizontal illumination of four (4) footcandle of light on the parking surface and/or walkways.

B. The premises of all adult entertainment establishments, except adult motion picture theaters, shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access and to provide an illumination of not less than two (2) footcandle of light as measured at the floor level.

C. Adult motion picture theaters and adult arcades shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which

patrons are permitted access and to provide an illumination of not less than one (1) footcandle of light as measured at the floor level.

12-12-14 Standards of Conduct – Live Performances or Performers.

All employees or performers of adult entertainment establishments which offer, conduct or maintain live adult entertainment shall adhere to the following standards of conduct:

A. No employee or performer shall mingle with patrons or serve food or drinks while nude.

B. No employee or performer shall encourage or knowingly permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

C. No employee or performer shall perform any obscene acts which simulate specified sexual activities.

D. No live adult entertainment performance shall be visible anywhere outside of the licensed establishment.

E. All performances shall take place upon a stage which shall be fixed and immovable. No audience seating shall be permitted within three feet (3') of any edge of the stage. No audience member shall be permitted upon the stage or within three feet (3') of any edge of the stage.

(F) No employee or performer may receive tips from patrons except that an establishment may place a tip box for all employees and performers at a conspicuous place within the establishment.

12-12-15 Additional Requirements.

A. All interior doors of any adult entertainment establishment, except restrooms, which provide access to any public area, shall remain unlocked at all times during which patrons are upon the premises.

B. Adult Bookstores and Adult Video Stores shall display all adult materials so that they cannot be seen, or are not accessible to any person other than patrons who have entered the licensed premises.

C. In addition to all other requirements of this Article, Adult Arcades shall comply with the following:

1. There shall be a manager's station(s) located within the premises from which there shall be an unobstructed line of sight to each booth, room or cubicle, except restrooms, upon or within which patrons are permitted access. Restrooms shall not contain video display equipment. The line of sight shall remain unobstructed at all times when patrons are upon the premises. At least one (1) employee shall be on duty and situated at each manager's station(s) at all times when patrons are upon the premises.

2. All booths shall be accessible to and from public areas and any door, screen, or covering which prevents an unobstructed view into such booth from public areas or a manager's station shall be prohibited.

3. All booths must be separated from other viewing booths by a solid, uninterrupted physical divider which is a minimum of one quarter inch (¼") thick and prevents any physical contact between occupants of any booth.

4. No booth may be occupied by more than one (1) person at any time.

D. It shall be unlawful for an adult bookstore or adult video store to allow adult material to be visible or accessible to any person under eighteen (18) years of age.

12-12-16 Right of Entry.

The application for an adult entertainment establishment license shall constitute consent of the licensee and such licensee's agents or employees to permit the City of Federal Heights Police Department or any other agent of the City of Federal Heights to conduct routine inspections of the adult entertainment establishment during the hours the establishment is open for business.

12-12-17 Exemptions.

It shall be an affirmative defense to prosecution under this Article if a person appearing nude did so in a modeling class operated:

A. By a state licenses [sic] school, licensed by the State of Colorado; a college, junior college or university supported entirely or partly by taxation;

B. By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or

C. In a Structure:

1. Which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

2. Where, in order to participate in a class, a student must enroll at least three (3) days in advance of that class; and

3. Where no more than one (1) nude model is on the premises at any one time.

APPENDIX I

Regulation 47-900. Conduct of Establishment.

A. Orderliness, loitering serving of intoxicated persons.

Each person licensed under Articles 46, 47, and 48 of Title 12, and any employee or agent of such licensee shall conduct the licensed premises in a decent, orderly and respectable manner; and shall not permit on the licensed premises the serving or loitering of a visibly intoxicated person or habitual drunkard, nor shall the licensee, his employee or agent knowingly permit any activity or acts of disorderly conduct as defined by and provided for in Section 18-9-106, C.R.S., nor shall a licensee permit rowdiness, undue noise, or other disturbances or activity offensive to the senses of the average citizen, or to the residents of the neighborhood in which the licensed establishment is located.

B. Attire and conduct of employees and patrons.

No person licensed under Articles 46, 47, and 48 of title 12, nor any employee or agent of such person licensed under these articles shall engage in or permit the following:

1. Employment or use of any person in the sale or service of alcohol beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the public hair, anus, cleft of the buttocks, vulva or genitals.

2. Employment or use of the services of any hostess or other person to mingle with the patrons while such hostess

or other person is unclothed or in such attire, costume or clothing as described in paragraph number (1) above.

3. Any person on the licensed premises touching, caressing or fondling the breasts, buttocks, anus, or genitals of any other person.

4. Any employee or person on the licensed premises wearing or using any device or covering, exposed to view, which simulates the breasts, genitals, anus, pubic hair or any other portion thereof.

C. Entertainment.

Live entertainment is permitted on any licensed premises, except that:

1. No person licensed under Articles 46, 47, and 48 of Title 12, nor any employee or agent of such person licensed under these Articles shall engage in or permit any person to perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

b. The touching, caressing or fondling of the breasts, buttocks, anus or genitals.

c. The displaying of pubic hair, anus, vulva or genitals.

2. No licensee nor any employee or agent of such licensee shall engage in or permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

3. No licensee nor any employee or agent of such licensee shall engage in or permit any person to remain in or upon

the licensed premises who exposes to public view any portion of his or her genitals or anus.

D. Visual displays.

No person licensed under Articles 46, 47, and 48 of Title 12, nor any employee or agent of such person licensed under these Articles, shall engage in or permit on the licensed premises the showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

1. Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

2. Any person being touched, caressed or fondled on the breasts, buttocks, anus or genitals.

3. Scenes wherein a person displays the vulva or the anus or the genitals.

4. Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

E. Local ordinances.

This regulation shall not be deemed to authorize or permit any conduct, behavior or attire on licensed premises which is otherwise prohibited by any city or county ordinances.

(2)

Supreme Court, U.S.
FILED

SEP 3 2002

OFFICE OF THE CLERK

No. 02-66

In The
Supreme Court of the United States

THE CITY OF FEDERAL HEIGHTS, COLORADO,

Petitioner,

v.

ESSENCE, INC., a Colorado corporation, d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ and LISA EASTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals To The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Tenth Circuit reversibly err in striking down the Federal Heights prohibition on 18-20 year old persons from seeing or presenting protected expression in the form of nude dancing where no evidence was presented to support this prohibition?

2. Does the prohibition on 18-20 year old persons from seeing or presenting protected expression in the form of nude dancing violate the First and Fourteenth Amendments to the United States Constitution?

3. Did the District Court abuse its discretion in refusing to consider a previously undisclosed former dancer's affidavit submitted on the date of the hearing on the cross-motions for summary judgment relating to alleged activities at the Respondent corporation's establishment?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The United States Court of Appeals for the Tenth Circuit and Colorado District Court accurately set forth the facts related to the constitutional challenges brought in the instant case. [Pet. App., pp. 1a-32a, 33a-56a]. Respondents herein brought a challenge to a Federal Heights, Colorado ordinance imposing a licensing requirement on adult entertainment businesses pursuant to 42 United States Code §1983. [Pet. App., pp. 86a-103a]. Among the restrictions was a prohibition contained in Section 12-12-11(B) of the Federal Heights Municipal Code which states:

> Additionally, it shall be unlawful for any person under twenty-one years of age to be upon the premises of any adult entertainment establishment which offers live nude dancing.

The constitutionality of this provision is the principle issue before this Court.

The District Court struck down this provision as it related to persons providing expression including nude dancing but upheld it with regard to patrons of the adult entertainment establishment. [Pet. App., pp. 38a-39a]. On appeal, the Tenth Circuit invalidated Section 12-12-11(B) in its entirety. [Pet. App., pp. 15a-28a]. Contrary to the City's erroneous statement in the Petition for Writ of Certiorari, p. 14, the Tenth Circuit also declared the employee licensing provision unconstitutional on the basis that it did not provide any avenue for judicial review as

required by *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990). [Pet. App., pp. 28a-30a].

REASONS FOR DENYING THE WRIT

I. THE TENTH CIRCUIT DID NOT ERR IN STRIKING DOWN THE PROHIBITION ON PERSONS UNDER THE AGE OF 21 FROM PRESENTING OR SEEING PROTECTED EXPRESSION WHERE NO EVIDENCE EXISTED TO SUPPORT SUCH A PROHIBITION

The City of Federal Heights asserts that the age restriction contained in the Section 12-12-11(B) is justified as a content neutral regulation of the secondary effects of nude dancing on persons between the ages of 18 and 20. In the Petition, the City, for the first time, asserts that the age prohibition "attempts to limit the negative secondary effects caused by exposing young and impressionable individuals to an atmosphere potentially teeming with tempting, illicit substances" and to "ensur[e] that its young people are not exposed to illicit substances or engage in underage drinking which is illegal under Colorado statutory law." [Pet., p. 26]. "Federal Heights concluded that despite the ban on the sale of alcoholic beverages at nude dancing establishments, alcohol was still likely to be present, and young people were still likely to be exposed to it." [Pet., p. 28]. The term "young people" – apparently refers to adults between the ages of 18 and 20.

The City goes on to argue that the Tenth Circuit holding in this case imposes greater burden on the City to justify its prohibition on protected speech for 18 to 20 year

old persons than required by the recent decision in *City of Los Angeles v. Alameda Books, Inc.*, ___U.S. __, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). However, the City's reliance on *Alameda Books* is misplaced.

The plurality opinion of Justice O'Connor, commanding the opinion of four justices, reaffirmed the analysis set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), with some clarification regarding the procedure for the evaluation of evidence advanced by both sides on the justification by the government to support the regulation of protected speech.

While the plurality relied upon *Renton* for the principle that a municipality may rely upon relevant evidence to demonstrate a connection between speech and a substantial independent government interest, it indicated that the government must prove more than just some rational relationship between the regulation and the government interest. "This is not to say a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *City of Los Angeles v. Alameda Books, Inc.*, __U.S. at___, 122 S. Ct., at 1736.

The evidence offered by the City reveals that the age prohibition in the instant case was indeed based upon shoddy data and reasoning. Both of the lower courts found that Federal Heights wholly failed in its obligation to advance a valid justification or evidence to support the prohibition on 18 to 20 year old adults from seeing or presenting protected expression at certain businesses.

Justice Kennedy provided the fifth vote in an opinion concurring in the judgement in *Alameda Books*. The main premise of Justice Kennedy's opinion was that "a city may

not regulate the secondary effects of speech by suppressing the speech itself. . . . Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech." *Id.* at 1739-40.

In addressing the specific issue before the Court, Justice Kennedy indicated that a municipality must advance some evidence that the quantity and access to speech is not significantly limited by regulations to reduce adverse, external secondary effects:

> [A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with JUSTICE SOUTER. See post, at 5. The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech.

Id. at 1742.

Federal Heights has undertaken to limit adverse secondary effects by prohibiting the speech of legal adults on the basis of their age. This prohibition applies to both the person engaged in expressive conduct, as well as the audience of this speech. "It is no trick to reduce adverse secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking

speech." *Id.* Here speech is prohibited to one group of adults to indirectly attack secondary effects.

In the Petition, the City cites several Colorado statutes and regulations concerning prohibitions on the use of alcohol by persons under 21 years of age. It is instructive to note that these statutes were not cited as a justification for the prohibition at any point by the City before the City Council in enacting this ordinance, or before the District Court or Court of Appeals in defending the ordinance.

The City seems to equate the regulation of alcoholic beverages with the regulation of speech. The City's argument is that if the government may prohibit the sale of alcoholic beverages to persons under the age of 21, it may also justify prohibitions on speech to those persons in establishments where alcohol is not served. Under this argument, if the State of Colorado raised the drinking age to 55, or completely prohibited alcoholic beverages, it could prohibit certain speech to avoid the adverse effects of alcohol to anyone it determines to be a vulnerable person. However, even the City would not dare suggest that the government's ability to outlaw speech is on the same level as the government's power to prohibit alcoholic beverages.

The City also cites several Colorado statutes and regulations concerning the legal age at which individuals are permitted to consume alcoholic beverages in Colorado, apparently to support its determination that 21 years of age is a valid cut off point for exercising First Amendment rights. However, the City incorrectly implies that in Colorado persons under the age of 21 are not allowed any access to alcoholic beverages. [Pet., p. 28]. The City's reasoning is seriously undermined by one of the statutes it provides that expressly allows persons under the age of 21

to be employed at, sell or dispense alcoholic beverages at liquor licensed establishments. *See*, Colorado Revised Statutes §12-47-901(5)(a)(1). [Pet. App., 72a].[1]

Thus, under the City's argument, an eighteen year old may legally serve liquor in a bar, but may not exercise First Amendment rights in an establishment where liquor is prohibited. The reasoning employed by Federal Heights to justify this prohibition on protected speech is exactly the shoddy reasoning that the plurality opinion in *Alameda Books* warned against. As such, the decision of the Tenth Circuit that Section 12-12-11(B) is unconstitutional is correct and the City's Petition for Certiorari should be denied.

II. FEDERAL HEIGHTS MUNICIPAL CODE §12-12-11(B) SHOULD NOT BE EVALUATED AS A TIME, PLACE AND MANNER RESTRICTION ON PROTECTED SPEECH SINCE IT ABSOLUTELY PROHIBITS ONE CLASS OF ADULTS FROM SEEING OR ENGAGING IN SPEECH

The City has never disputed the District Court's determination that 18 year olds are considered adults and are not legally classified as minors under numerous Colorado statutes. [Pet. App., pp. 37a-39a]. However, the City maintains that the age restriction is a time, place,

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[1] Colorado Revised statutes, section 12-47-901(5)(a)(1) provides:

"[N]o person under the age of twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors unless he or she is supervised by another person who is on premise and has attained the age of twenty one years of age."

and manner regulation of protected speech enacted "to limit the negative secondary effects caused by exposing young and impressionable individuals to an atmosphere potentially teeming with tempting, illicit substances." [Pet., p. 26].

Recently, in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), the Court rejected a similar argument concerning "cyber-zoning" of the internet as a time, place and manner restriction in striking down the Communications Decency Act (CDA), 47 U.S.C. §223.

Justice O'Connor, in her dissenting (in part) opinion, dealt extensively with the "zoning" law analogy:

> The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. States have also denied minors access to speech deemed to be "harmful to minors." The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. [Footnotes omitted] 475 U.S., at 877-888.
>
> * * *
>
> Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain – it interferes with the rights of adults to obtain constitutionally protected

> speech and effectively "reduces the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957). The First Amendment does not tolerate such interference. 475 U.S. at 888

Section 12-12-11(B) of the Federal Heights Municipal Code wholly denies adults between 18 and 20 years of age the ability to see or present protected expression. The ordinance completely bars this segment of the adult population from this type of speech and effectively reduces this category of legally recognized adults to the level of children.

The City repeatedly asserts that the age restriction is directed at the secondary effects of nude dancing on persons between the ages of 18 to 20. These secondary effects now identified by the City are that persons between the ages of 18 to 20 are at "greater risk" of being affected by exposure to an atmosphere that could involve exposure to illicit substances.

The City has artfully attempted to manufacture a valid justification out of thin air. The only evidence advanced by Federal Heights to support the age prohibition is an affidavit from the Mayor Pro Tem. Both the District Court [Pet. App., p. 38a-39a] and the Tenth Circuit [Pet. App., p. 27a] rejected this affidavit as inadequate to support the ordinance.

The Mayor's conclusory statement provides no valid evidentiary foundation on which to base the prohibition of a segment of the adult population from engaging in protected speech. Indeed, the City has provided absolutely no evidence that the alleged adverse secondary effects of nude dancing have any particular special impact on adults

between the ages of 18 and 20, nor do any of the studies relied upon by the City deal with the issue of 18 to 20 year olds at nude dancing establishments in any way, shape or form. In short, the City did not rely on any real evidence relating to the alleged secondary effects of such entertainment on 18 to 20 year olds.

In addition, there is not a single mention in the legislative record of any justification for arriving at the age of 21 as the cut off point for protected speech. The City might just as well have arrived at the ages of 31, 54, or 83 as the point at which adults need protection from the alleged "adverse secondary effects" of nude entertainment. Surely, restricting the expression and receipt of nude dancing to senior citizens would be considered a content based restraint of expression subject to strict scrutiny. The City's effort to package this age restriction as a content neutral regulation to protect "young persons" from the evils of exposure to "illicit substances" is nothing more than a semantic ruse. As such, Section 12-12-11 was properly declared unconstitutional.

Moreover, none of the "whereas" clauses in the challenged enactment contain any reference to adults between the ages of 18 to 20 years as being particularly vulnerable to the alleged adverse secondary effects of adult businesses. *See also, United States v. Playboy Entertainment Group,* __ U.S. __, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000) (striking down §505 of Communications Decency Act imposing cable television restrictions of adult entertainment).

Based upon the fact that Section 12-12-11 imposes a complete restraint on protected speech for a segment of the adult population on the basis of the content of that speech in the absence of *any* valid evidence to support

such a total restriction, the age restriction clearly violates the First and Fourteenth Amendments to the United States Constitution.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT NEW EVIDENCE AT THE HEARING ON THE MOTIONS FOR SUMMARY JUDGMENT

At the March 19, 1999 hearing on the motions for summary judgment [Pet. App., pp. 59a-62a], the City sought to offer the affidavit of Jennifer Weaver [Pet. App., pp. 63a-66a]. In the affidavit dated March 18, 1999, a former employee of Respondent's establishment, made numerous new allegations of unsavory conduct at the establishment.

Respondents never had any opportunity to investigate or rebut these allegations in any way. At the hearing, the District Court refused to allow the last minute evidence stating, "it was not going to rely on it for the purposes of this argument." [Pet. App., p. 62a]. The Tenth Circuit carefully evaluated the District Court's ruling and determined that the refusal to admit this affidavit was not an abuse of discretion. [Pet. App., p. 26a].

Under these circumstances, it is clear the District Court did not abuse its discretion in rejecting this last minute, prejudicial evidence that Respondents had never before seen, from a witness who had never been disclosed at any point previously in the litigation. Respondents could not be expected to fairly present rebuttal evidence or arguments concerning these previously undisclosed allegations.

As summed up by the Tenth Circuit, "the City's position is essentially that an abuse of discretion arises

whenever a district court refuses to consider evidence necessary to one party's case." [Pet. App., p. 26a]. Based upon the circumstances of this case, the Tenth Circuit was not prepared to accept such an argument. This Court should not accept the City's invitation either.

CONCLUSION

Based upon the foregoing arguments and authorities, Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Dated: September 3, 2002.

Respectfully submitted,

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THE CITY OF FEDERAL HEIGHTS, COLORADO,

Petitioner,

v.

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Federal Heights, Colorado, respectfully submits its Reply Brief in Support of its request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit invalidating the age restriction in Federal Heights' adult entertainment ordinance.

STATEMENT OF THE CASE

The City of Federal Heights, Colorado ("Federal Heights"), like many other cities in the United States, adopted a regulatory scheme to diminish the negative secondary effects of adult entertainment establishments on neighborhoods and on the community in general. Sanclub Corporation,[1] which operated The Bare Essence, a live, all-nude dancing establishment, challenged several provisions of Federal Heights' Municipal Code regulating adult entertainment establishments. As is discussed in the Statement of the Case contained in Federal Heights' Petition for Writ of Certiorari, the only provision of Federal Heights' Municipal Code sought to be reviewed by this Court is the provision which seeks to protect those under twenty-one years of age from exposure to alcohol and illicit substances by prohibiting their entry in adult entertainment establishments offering live nude dancing. Federal Heights, Colo.

[1] The Bare Essence, Inc. was substituted for Sanclub Corporation as a plaintiff in this action by the Tenth Circuit.

Code § 12-12-11. (See Petition for Writ of Certiorari, pp. 2 and 7-8.)

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION IS DISCORDANT WITH *LOS ANGELES*.

The United States Court of Appeals for the Tenth Circuit's decision pre-dates this Court's opinion in *City of Los Angeles v. Alameda Books, Inc.*, ___ U.S. ___, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). The Tenth Circuit's decision fails to analyze Federal Heights' ordinance according to the test adopted in *Los Angeles, supra,* and contradicts *Los Angeles'* holding. By granting the Petition for Writ of Certiorari, this Court can address and correct these inconsistencies.

Respondents argue that the Tenth Circuit's decision should not be reviewed because the Tenth Circuit reached the correct conclusion when it struck down Federal Heights' age restriction ordinance. They contend, first, that Federal Heights offered "shoddy" research to support the ordinance, which, they claim, fails to establish that the ordinance benefits the community. Second, they argue that, even though the ordinance regulates adult entertainment establishments, it should not be analyzed under the "time, place, and manner" test adopted by this Court and declared applicable to ordinances regulating such establishments. Finally, without any analysis, Respondents state that the trial court's exclusion of evidence gathered by Federal Heights in support of its ordinance was properly affirmed by the Tenth Circuit.

However, as is addressed more fully below, Respondents ignore critical analyses articulated in *Los Angeles,*

supra, and misconstrue the evidence supporting Federal Heights' ordinance. Applying the test adopted in *Los Angeles, supra*, and applied correctly by the United States Court of Appeals for the Fifth Circuit in *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002), Federal Heights' ordinance passes First Amendment scrutiny.

II. FEDERAL HEIGHTS' ORDINANCE IS PROPERLY ANALYZED AS A TIME, PLACE, OR MANNER REGULATION.

Federal Heights' ordinance is properly analyzed as a time, place, or manner restriction similar to other municipal regulations governing adult entertainment. This Court has stated that "at least with respect to businesses that purvey sexually explicit materials," regulations governing the speech displayed at such establishments should be analyzed as content-neutral and reviewed under the substantial interest test assessing the time, place, and manner regulation governing the business. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1985). This test is properly applied when regulations governing adult entertainment establishments are analyzed. Indeed, contrary to Respondents' implication, both lower courts analyzed Federal Heights' ordinance as a content-neutral time, place, and manner restriction, although the lower courts misapplied the test by increasing Federal Heights' burden beyond that required by this Court.

Even regulations which arguably entirely deprived dancers and patrons of the right to express themselves through nude dancing have been analyzed as time, place and manner restrictions because the municipality's substantial interest in reducing harmful secondary effects

rendered the regulation content-neutral. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Such limitations on otherwise expressive speech are tolerated because

> it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . . If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based.

City of Erie, 529 U.S. at 294, 120 S.Ct. at 1393-1394.

Respondents contend that the content-neutral, substantial interest test is inapplicable in this case. In support of their contention, they rely upon *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). In *Reno*, a majority of this Court invalidated portions of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 223, because the statute was overly vague, failed to define critical terms such as "indecent" and "patently offensive", and was a content-based blanket restriction on speech rather than a restriction intended to address the secondary effects caused by the dissemination of "indecent" materials on the internet. *Reno*, 521 U.S. at 867-868, 117 S.Ct. at 2342. Respondents imply that Federal Heights' ordinance suffers from the deficiencies of the CDA discussed in *Reno, supra*, and was therefore properly struck down by the Tenth Circuit.

Federal Heights' ordinance is easily distinguished from the CDA, however. The former is designed and intended to ameliorate the secondary effects caused by the exposure of those below the legal drinking age to an

atmosphere in which alcoholic beverages and illicit substances are readily available, and to reduce crime known to be associated with the presence of adult entertainment establishments. Consumption, service, sale, delivery, and procurement of alcohol by and for those less than twenty-one years are crimes under Colorado statutory law, as is the possession of illegal drugs. C.R.S. §§ 12-47-901 and 18-13-122. Federal Heights intended to further this State interest by limiting these young adults' exposure to alcohol and illicit drugs in places in which alcohol is known to be present and consumed. (See Affidavit of Jennifer Weaver, Appendix E to Petition for Writ of Certiorari, p. App. 64.) Unlike the CDA, Federal Heights' ordinance is tailored to diminish secondary effects, not to act as a primary bar to speech.

Reno, itself, distinguishes the CDA from regulations governing adult entertainment. *Reno* points out that unlike *Renton*'s regulation, "the purpose of the CDA is to protect children from the *primary* effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." *Reno*, 521 U.S. at 868, 117 S.Ct. at 2342 (emphasis added). In other words, the CDA's *intent* was to limit and restrict an individual's exposure to the offensive speech, and, as such was an impermissible blanket restriction on speech. In contrast, Federal Heights' ordinance, like the ordinance at issue in *Renton*, *supra*, and *Los Angeles, supra*, aimed to reduce other negative effects that are associated with the presence of adult entertainment establishments. Because Federal Heights' age restriction ordinance addresses secondary effects it is content-neutral and is properly analyzed as a time, place, and manner restriction justified by Federal Heights' substantial interest in reducing the stated secondary effects.

III. THE EVIDENCE OFFERED BY FEDERAL HEIGHTS IN SUPPORT OF ITS ORDINANCE WAS MORE THAN SUFFICIENT UNDER THE ANALYSIS ADOPTED IN *LOS ANGELES*.

Federal Heights has "artfully" (See Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 8.) articulated its substantial interest in diminishing the negative secondary effects of exposing young adults not yet permitted to consume alcohol to situations where drinks and drugs are likely to be present and consumed. Yet, Respondents would have this Court believe that Federal Heights' reasons are simply a ruse designed to sidetrack the Court from the ordinance's actual purpose – "depriving" young adults of their First Amendment right to express themselves and entertain themselves through live nude dancing. Respondents' argument ignores critical analysis adopted by this Court, however.

To advance their argument, Respondents cast the age restriction ordinance as an extreme measure that could deprive any adult of access to adult entertainment. They proceed by equating Federal Heights' ordinance with regulations governing the consumption of alcoholic beverages by minors. (See Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 5.) Respondents have warped the ordinance beyond its meaning and intention to serve their purpose by characterizing it as an extreme infringement on First Amendment protected speech.

Federal Heights did not choose the age for the restriction out of thin air. Using the State's age limitation for alcohol consumption as a guide, Federal Heights determined that it could best achieve its substantial interest of diminishing young adults' exposure to illicit alcoholic beverages by limiting their exposure to avenues in which alcoholic beverages were likely to be present, most notably

establishments with live nude dancing. Contrary to Respondents' exaggerated assertion, Federal Heights did not randomly choose to "cut off" adults' access to live nude entertainment (See Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 9.); the age set in the regulation was clearly chosen to correspond *directly* with the age determined by the State to be acceptable for the consumption of alcohol.

Respondents also inarticulately suggest that Federal Heights' justification for the ordinance is specious because it deprives adults of their ability to exercise a constitutional right based upon a restriction limiting alcohol consumption, which is a mere privilege. Yet, this argument, too, fails when analyzed more closely. Federal Heights' ordinance is akin to those regulations discussed in *Renton, supra, Los Angeles, supra,* and their respective progeny and ancestry, in which businesses that deal in sexually explicit materials are limited in the exercise of certain privileges and their patrons thus restricted in their access to certain speech, to accomplish the greater good of protecting the community from the harmful secondary effects caused by these establishments. For example, in *City of Erie, supra*, this Court upheld as constitutional an ordinance that completely banned all live nude dancing. Although all patrons and dancers were thus deprived of their rights to self expression and speech through nudity, this Court upheld the ordinance finding the City of Erie's desire to reduce the harmful secondary effects caused by the presence of live nude dancing establishments justified the ban.

Underlying Respondents' criticism of Federal Heights' justification for the age restriction ordinance is their contention that Federal Heights must produce additional

evidence demonstrating that the ordinance accomplishes its stated goal of minimizing the secondary effects caused by the presence of adult entertainment establishments. However, Respondents have mischaracterized Federal Heights' burden.

Municipalities must be given some latitude to try new solutions to ameliorate the problems brought about by the presence of adult entertainment establishments; "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city *must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.*" *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310 (1976) (emphasis added). Therefore, the specifically tailored evidence sought by Respondents and demanded by the Tenth Circuit will not always be available and is not necessary under this Court's precedents. Indeed, the City of Erie, whose complete prohibition of all nude dancing was upheld, "could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *City of Erie*, 529 U.S. at 297, 120 S.Ct. at 1395. The City of Erie was not required to produce studies demonstrating that the prohibition against nude dancing reduced negative secondary effects. Federal Heights should similarly be permitted to rely upon studies showing adult entertainment establishments negatively affect communities.

The evidence offered by Federal Heights at the time it passed the ordinance was remarkably similar to the evidence offered by the City of Los Angeles in support of its ordinance. *Los Angeles,* 122 S.Ct. at 1732. In essence, the City of Los Angeles relied upon a general study that

concluded that "concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in the surrounding community." *Id.* Nothing in the studies suggested that prohibiting the clustering of adult entertainment establishments in one building would reduce crime and other negative effects. Yet this Court held that the City of Los Angeles had provided sufficient evidence in support of its ordinance, and was required to show the existence of only "a link between concentrations of adult operations and asserted secondary effects." *Id.* at 1735. By requiring more, the Tenth Circuit has demanded more of Federal Heights than this Court requires. This Court should therefore review the Tenth Circuit's ruling.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING FEDERAL HEIGHTS' EVIDENCE BECAUSE IT DEPRIVED FEDERAL HEIGHTS OF THE OPPORTUNITY TO EXPERIMENT WITH SOLUTIONS.

Federal Heights attempted to take advantage of the "reasonable opportunity" mandated by *American Mini Theatres, supra,* to explore creative solutions to the problems caused by adult entertainment establishments and underage drinking. *American Mini Theatres,* 42 U.S. at 71, 96 S.Ct. at 2453. Evidence of the ordinance's benefit does not have to be offered contemporaneously with the passage of the ordinance. With the latitude to explore solutions must come the opportunity to collect and offer evidence as it becomes available. See *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). The Tenth Circuit itself acknowledged that evidence of secondary effects caused by the presence of adult entertainment establishments might not become available until "years" after the enactment of the applicable ordinance. (Order of

the Tenth Circuit, Appendix A to Petition for Writ of Certiorari, p. App. 18.) The evidence, when obtained, should therefore be accepted.

Federal Heights offered the Affidavit of Jennifer Weaver only one day after she signed it. The Affidavit confirmed the presence of most, if not all, of the very negative effects which Federal Heights sought to diminish by its ordinance. Thus, Federal Heights offered its additional evidence as soon as it was available and known to the City. The District Court's refusal to consider the Affidavit punished Federal Heights for conducting the very type of inquiry they were permitted and encouraged to conduct by this Court in *American Mini Theatres, supra*. Rejecting the Affidavit constituted reversible abuse of discretion.

CONCLUSION

THEREFORE, Petitioner CITY OF FEDERAL HEIGHTS, COLORADO requests this Court GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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